## 1AC Districts

### Plan

#### The United States federal government should limit the President's war powers authority to assert, on behalf of the United States, immunity from judicial review by establishing a cause of action allowing civil suits brought against the United States by those unlawfully injured by targeted killing operations, their heirs, or their estates in security cleared legal proceedings.

### Advantage 1 is Preventive War

#### US justifications for targeted killing will spill over to erode legal restraints on all violence and legitimize preventive war

Craig Martin 11, Associate Professor of Law at Washburn University School of Law, “Going Medieval: Targeted Killing, Self-Defence, and the Jus Ad Bellum Regime,” Ch 8 in TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD, p. 223, available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1956141

IV. The potential impact of the targeted killing policy on international law

The United States has been engaging in this practice of using drone-mounted missile systems to kill targeted individuals since at least 2002.98 An increasing number of countries have employed different methods of targeted killing that constitute a use of force under jus ad bellum.99 The evidence suggests that the United States intends to continue and indeed expand the program, and there is a growing body of scholarly literature that either defends the policy’s legality, or advocates adjustment in international law to permit such action. There is, therefore, a real prospect that the practice could become more widespread, and that customary international law could begin to shift to reflect the principles implicit in the U.S. justification and in accordance with the rationales developed to support it.¶ Some of the implications of such an adjustment in the jus ad bellum regime are obvious from the foregoing analysis. As discussed, there would be a rejection of the narrow principle of self-defense in favor of something much closer to the Grotian concept of defensive war, encompassing punitive measures in response to past attacks and preventative uses of force to halt the development of future threats. The current conditions for a legitimate use of force in self-defense, namely the occurrence or imminence of an armed attack, necessity, and proportionality, would be significantly diluted or abandoned. Not only the doctrine of self-defense, but other aspects of the collective security system would be relaxed as well. Harkening back to Grotian notions of law enforcement constituting a just cause for war, the adjusted jus ad bellum regime would potentially permit the unilateral use of force against and within states for the purpose of attacking NSAs as such, in effect to enforce international law in jurisdictions that were incapable of doing so themselves.100 This would not only further undermine the concept of self-defense, but would undermine the exclusive jurisdiction that the U.N. Security Council currently has to authorize the use of force for purposes of “law enforcement” under Chapter VII of the Charter. Thus, both of the exceptions to the Article 2(4) prohibition on the use of force would be expanded.¶ In addition, however, the targeted killing policy threatens to create other holes in the jus ad bellum regime. This less obvious injury would arise from changes that would be similarly required of the IHL regime, and the resulting modifications to the fundamental relationship between the two regimes. These changes could lead to a complete severance of the remaining connection between the two regimes. Indeed, Ken Anderson, a scholar who has testified more than once on this subject before the U.S. Congress,101 has advocated just such a position, suggesting that the United States should assert that its use of force against other states in the process of targeted killings, while justified by the right to self-defense, does not rise to such a level that it would trigger the existence of an international armed conflict or the operation of IHL principles.102 If customary international law evolved along such lines, reverting to gradations in the types of use of force the change would destroy the unity of the system comprised of the jus ad bellum and IHL regimes, and there would be legal “black holes” in which states could use force without being subject to the limitations and conditions imposed by the IHL regime.¶ The structure of Harold Koh’s two-pronged justification similarly implies a severance of this relationship between jus ad bellum and IHL, albeit in a different and even more troubling way. His policy justification consists of two apparently independent and alternative arguments—that the United States is in an armed conflict with Al Qaeda and associated groups; and that the actions are justified as an exercise of self-defense. The suggestion seems to be that the United States is entitled on either basis to use armed force not just against the individuals targeted, but also against states in which the terrorist members are located. In other words, the first prong of the argument is that the use of force against another sovereign state, for the purposes of targeting Al Qaeda members, is justified by the existence of an armed conflict with Al Qaeda. If this is indeed what is intended by the policy justification, it represents an extraordinary move, not just because it purports to create a new category of armed conflict (that is, a “transnational” armed conflict without geographic limitation),103 but because it also suggests that there need be no jus ad bellum justification at all for a use of force against another state. Rather, the implication of Koh’s rationale is that the existence of an armed conflict under IHL can by itself provide grounds for exemption from the prohibition against the threat or use of force under the jus ad bellum regime.¶ This interpretation of the justifications cannot be pressed too far on the basis of the language of Mr. Koh’s speech alone, which he hastened to explain at the time was not a legal opinion.104 The two justifications could be explained as being supplementary rather than independent and alternative in nature. But the conduct of the United States in the prosecution of the policy would appear to confirm that it is based on these two independent justifications.105 The strikes against groups and states unrelated to the 9/11 attacks could be explained in part by the novel idea that force can be used against NSAs as such, wherever they may be situated. But even assuming some sort of strict liability for states in which guilty NSAs are found, that explanation still does not entirely account for the failure to tie the use of force against the different groups to specific armed attacks launched by each such group. This suggests that the United States is also relying quite independently on the argument that it is engaged in an armed conflict with all of these groups, and that the existence of such an armed conflict provides an independent justification for the use of force against the states in which the groups may be operating.¶ While the initial use of force in jus ad bellum terms is currently understood to bring into existence an international armed conflict and trigger the operation of IHL, the changes suggested by the policy would turn this on its head, by permitting the alleged existence of a “transnational” armed conflict to justify the initial use of force against third states. Whereas the two regimes currently operate as two components of an overall legal system relating to war, with one regime governing the use of force and the other the conduct of hostilities in the resulting armed conflict, the move attempted by the U.S. policy would terminate these independent but inter-related roles within a single system, and expand the role and scope of IHL to essentially replace aspects of the jus ad bellum regime. This would not only radically erode the jus ad bellum regime’s control over the state use of force, but it could potentially undermine the core idea that war, or in more modern terms the use of force and armed conflict, constitutes a legal state that triggers the operation of special laws that govern the various aspects of the phenomenon. There is a risk of return to a pre-Grotian perspective in which “war” was simply a term used to describe certain kinds of organized violence, rather than constituting a legal institution characterized by a coherent system of laws designed to govern and constrain all aspects of its operation.¶ There is a tendency in the U.S. approach to the so-called “global war on terror” to cherry-pick principles of the laws of war and to apply them in ways and in circumstances that are inconsistent with the very criteria within that legal system that determine when and how it is to operate. This reflects a certain disdain for the idea that the laws of war constitute an internally coherent system of law.106 In short, the advocated changes to the jus ad bellum regime and to the relationship between it and the IHL regime, and thus to the laws of war system as a whole,107 would constitute marked departures from the trajectory the system has been on during its development over the past century, and would be a repudiation of deliberate decisions that were made in creating the U.N. system after the Second World War.108¶ The premise of my argument is not that any return to past principles is inherently regressive. A rejection of recent innovations in favor of certain past practices might be attractive to some in the face of new transnational threats. The argument here is not even to deny the idea that the international law system may have to adapt to respond to the transnational terrorist threat. The point, rather, is that the kinds of changes to the international law system that are implicit in the targeted killing policy, and which are advocated by its supporters, would serve to radically reduce the limitations and constraints on the use of force by states against states. The modern principles that are being abandoned were created for the purpose of limiting the use of force and thus reducing the incidence of armed conflict among nations. The rejection of those ideas and a return to older concepts relating to the law of war would restore aspects of a system in which war was a legitimate tool of statecraft, and international armed conflict was thus far more frequent and widespread.109¶ The entire debate on targeted killing is so narrowly focused on the particular problems posed by transnational terrorist threats, and how to manipulate the legal limitations that tend to frustrate some of the desired policy choices, that there is insufficient reflection on the broader context, and the consequences that proposed changes to the legal constraints would have on the wider legal system of which they are a part. It may serve the immediate requirements of the American government, in order to legitimize the killing of AQAP members in Yemen, to expand the concept of self-defense, and to suggest that states can use force on the basis of a putative “transnational” armed conflict with NSAs. The problem is that the jus ad bellum regime applies to all state use of force, and it is not being adjusted in some tailored way to deal with terrorism alone. If the doctrine of self-defense is expanded to include preventative and punitive elements, it will be so expanded for all jus ad bellum purposes. The expanded doctrine of self-defense will not only justify the use of force to kill individual terrorists alleged to be plotting future attacks, but to strike the military facilities of states suspected of preparing for future aggression. If the threshold for use of force against states “harboring” NSAs is significantly reduced, the gap between state responsibility and the criteria for use of force will be reduced for all purposes. If the relationship between jus ad bellum and IHL is severed or altered, so as to create justifications for the use of force that are entirely independent of the jus ad bellum regime, then states will be entitled to use force against other states under the pretext of self-proclaimed armed conflict with NSAs generally.¶ We may think about each of these innovations as being related specifically to operations against terrorist groups that have been responsible for heinous attacks, and applied to states that have proven uniquely unwilling or unable to take the actions necessary to deal with the terrorists operating within their territory. But no clear criteria or qualifications are in fact tied to the modifications that are being advanced by the targeted killing policy. Relaxing the current legal constraints on the use of force and introducing new but poorly defined standards, will open up opportunities for states to use force against other states for reasons that have nothing to do with anti-terrorist objectives. Along the lines that Jeremy Waldron argues in chapter 4 in this volume,110 more careful thought ought to be given to the general norms that we are at risk of developing in the interest of justifying the very specific targeted killing policy. Ultimately, war between nations is a far greater threat, and is a potential source of so much more human suffering than the danger posed by transnational terrorism. This is not to trivialize the risks that terrorism represents, particularly in an age when Al Qaeda and others have sought nuclear weapons. But we must be careful not to undermine the system designed to constrain the use of force and reduce the incidence of international armed conflict, in order to address a threat that is much less serious in the grand scheme of things.

#### Robust norms restricting the use of force empirically prevent conflict escalation among great powers

John Vasquez 9, Thomas B. Mackie Scholar of International Relations and Professor of Political Science at the University of Illinois at Urbana-Champaign, PhD in Poli Sci from Syracuse University, “Peace,” Chapter 8 in The War Puzzle Revisited, p 298-299, google books

Wallensteen’s examination of the characteristics of particularist periods provides significant additional evidence that the steps-to-war analysis is on the right track. Realist practices are associated with war, and peaceful systems are associated with an emphasis on other practices. Peaceful systems are exemplified by the use of practices like buffer states, compensation, and concerts of power that bring major states together to form a network of institutions that provide governance for the system. The creation of rules of the game that can handle certain kinds of issues – territorial and ideological questions – and/or keep them off the agenda seems to be a crucial variable in producing peace.¶ Additional evidence on the import of rules and norms is provided in a series of studies by Kegley and Raymond (1982, 1984, 1986, 1990) that are operationally more precise than Wallensteen’s (1984) analysis. Kegley and Raymond provide evidence that when states accept norms, the incidence of war and military confrontation is reduced. They find that peace is associated with periods in which alliance norms are considered binding and the unilateral abrogation of commitments and treaties illegitimate. The rules imposed by the global political culture in these periods result in fewer militarized disputes and wars between major states. In addition, the wars that occur are kept at lower levels of severity, magnitude, and duration (i.e. they are limited wars).¶ Kegley and Raymond attempt to measure the extent to which global cultural norms restrain major states by looking at whether international law and commentary on it sees treaties and alliances as binding. They note that there have been two traditions in international law – pacta sunt servanda, which maintains that agreements are binding, and clausa rebus sic stantibus, which says that treaties are signed “as matters stand” and that any change in circumstances since the treaty was signed permits a party to withdraw unilaterally. One of the advantages the Kegley-Raymond studies have over Wallensteen (1984) is that they are able to develop reliable measures of the extent to which in any given half-decade that tradition in international law emphasizes the rebus or pacta sunt servanda tradition. This indicator is important not only because it focuses in on the question of unilateral actions, but because it can serve as an indicator of how well the peace system is working. The pacta sunt servanda tradition implies a more constraining political system and robust institutional context which should provide an alternative to war.¶ Kegley and Raymond (1982: 586) find that in half-decades (from 1820 to 1914) when treaties are considered non-binding (rebus), wars between major states occur in every half-decade (100 percent), but when treaties are considered binding (pacta sunt servanda), wars between major states occur in only 50 percent of the half-decades. The Cramer’s V for this relationship is .66. When the sample is expanded to include all states in the central system, Cramer’s V is 0.44, indicating that global norms have more impact on preventing war between major states. Nevertheless, among central system states between 1820 and 1939, war occurred in 93 percent of the half-decades where the rebus tradition dominated and in only 60 percent of the half-decades where the pacta sunt sevanda tradition dominated.¶ In a subsequent analysis of militarized disputes from 1820 to 1914, Kegley and Raymond (1984: 207-11) find that there is a negative relationship between binding norms and the frequency and scope of disputes short of war. In periods when the global culture accepts the pacta sunt servanda tradition as the norm, the number of military disputes goes down and the number of major states involved in a dispute decreases. Although the relationship is of moderate strength, it is not eliminated by other variables, namely alliance flexibility. As Kegley and Raymond (1984: 213) point out, this means “that in periods when the opportunistic renunciation of commitments” is condoned, militarized disputes are more likely to occur and to spread. The finding that norms can reduce the frequency and scope of disputes is significant evidence that rules can permit actors to successfully control and manage disputes so that they are not contagious and they do not escalate to war. These findings are consistent with Wallensteen’s (1984) and suggest that one of the ways rules help prevent war is by reducing, limiting, and managing disputes short of war.

#### Specifically, executive discretion over the legitimacy of targets will eviscerate legal restrictions on self-defense

Rosa Brooks 13, Professor of Law at the Georgetown University Law Center, Bernard L. Schwartz Senior Fellow at the New America Foundation, “The Constitutional and Counterterrorism Implications of Targeted Killing,” http://www.judiciary.senate.gov/pdf/04-23-13BrooksTestimony.pdf

5. Setting Troubling International Precedents ¶ Here is an additional reason to worry about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in “targeted killings” of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice. ¶ Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. We should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and –literally -- get away with murder. ¶ Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.42 In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,43 or in self-defense "in the event of an armed attack." ¶ The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular. ¶ It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will consent to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will not consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem. ¶ This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.44 If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill- defined war, why shouldn’t other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

#### Now is key---US targeted killing is driving a global shift in strategic doctrines---results in nuclear war

Kerstin Fisk 13, visiting assistant professor in the Department of Political Science at Loyola Marymount University, PhD in Political Science from Claremont Graduate University, and Jennifer M. Ramos, Assistant Professor of Political Science at Loyola Marymount University, PhD in Political Science from UC Davis, April 15 2013, “Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm,” International Studies Perspectives, http://onlinelibrary.wiley.com.turing.library.northwestern.edu/doi/10.1111/insp.12013/full

Preventive self-defense entails waging a war or an attack by choice, in order to prevent a suspected enemy from changing the status quo in an unfavorable direction. Prevention is acting in anticipation of a suspected latent threat that might fully emerge someday. One might rightfully point out that preventive strikes are nothing new—the Iraq War is simply a more recent example in a long history of the preventive use of force. The strategic theorist Colin Gray (2007:27), for example, argues that “far from being a rare and awful crime against an historical norm, preventive war is, and has always been, so common, that its occurrence seems remarkable only to those who do not know their history.” Prevention may be common throughout history, but this does not change the fact that it became increasingly difficult to justify after World War II, as the international community developed a core set of normative principles to guide state behavior, including war as a last resort. The threshold for war was set high, imposing a stringent standard for states acting in self-defense. Gray concedes that there has been a “slow and erratic, but nevertheless genuine, growth of a global norm that regards the resort to war as an extraordinary and even desperate measure” and that the Iraq war set a “dangerous precedent” (44). Although our cases do not provide a definitive answer for whether a preventive self-defense norm is diffusing, they do provide some initial evidence that states are re-orienting their military and strategic doctrines toward offense. In addition, these states have all either acquired or developed unmanned aerial vehicles for the purposes of reconnaissance, surveillance, and/or precision targeting.¶ Thus, the results of our plausibility probe provide some evidence that the global norm regarding the use of force as a last resort is waning, and that a preventive self-defense norm is emerging and cascading following the example set by the United States. At the same time, there is variation among our cases in the extent to which they apply the strategy of self-defense. China, for example, has limited their adaption of this strategy to targeted killings, while Russia has declared their strategy to include the possibility of a preventive nuclear war. Yet, the preventive self-defense strategy is not just for powerful actors. Lesser powers may choose to adopt it as well, though perhaps only implementing the strategy against actors with equal or lesser power. Research in this vein would compliment our analyses herein.¶ With the proliferation of technology in a globalized world, it seems only a matter of time before countries that do not have drone technology are in the minority. While preventive self-defense strategies and drones are not inherently linked, current rhetoric and practice do tie them together. Though it is likely far into the future, it is all the more important to consider the final stage of norm evolution—internalization—for this particular norm. While scholars tend to think of norms as “good,” this one is not so clear-cut. If the preventive self-defense norm is taken for granted, integrated into practice without further consideration, it inherently changes the functioning of international relations. And unmanned aerial vehicles, by reducing the costs of war, make claims of preventive self-defense more palatable to the public. Yet a global norm of preventive self-defense is likely to be destabilizing, leading to more war in the international system, not less. It clearly violates notions of just war principles—jus ad bellum. The United States has set a dangerous precedent, and by continuing its preventive strike policy it continues to provide other states with the justification to do the same.

#### Credible external oversight is key to solve---the alternative is an anything-goes standard

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Further, the U.S. counterterrorism chief John Brennan has noted that the administration is "establishing precedents that other nations may follow." But, for now, other countries have no reason to believe that the United States carries out its own targeted killing operations responsibly. Without a credible oversight program, those negative perceptions of U.S. behavior will fill the vacuum, and an anything-goes standard might be the result. U.S. denunciations of other countries' programs could come to ring hollow. ¶ If the United States did adopt an oversight system, those denunciations would carry more weight. So, too, would U.S. pressure on other states to adopt similar systems: just as suspicions grow when countries refuse nuclear inspection, foreign governments that turned down invitations to apply a proven system of oversight to their own drone campaigns would reveal their disregard for humanitarian concerns.

#### That causes an endless, global series of preventive wars---those go nuclear

Ariel Colonomos 13, Director of Research at the French National Centre for Scientific Research, Ph.D. in political science from the Institut d'Etudes Politiques de Paris, “The Gamble of War: Is it Possible to Justify Preventive War?” p 72-75, google books

John Yoo holds that the American interventions in Afghanistan or Iraq fulfilled the criteria of necessity and proportionality. To support this argument (which was contested on the invasion of Iraq), he contends that technological change has a direct impact on the calculation of proportionality and the definition of what constitutes an emergency. The proliferation of WMDs, the networking potential of the United States’ enemies, involving also transnational movements, required the adoption of an anticipatory mode of use of force. This is a disturbing line of reasoning. On the one hand—and this is the case with many of the propositions advanced by these intellectuals—it sweeps away the contemporary model of international law, which is based on a cautious (though, it should also be said, ambiguous and hence fragile) interpretation of self-defense. On the other hand, the transition from the empirical to the normative is very abrupt here, with the argument that law depends on the “reality” specific to a particular moment of history. Insofar as WMDs are actually within the reach of a large number of the United States’ enemies today (the USSR and China are no longer the only threats), the world would, in this view, be constantly on tenterhooks at the possibility of a series of preventive wars. These would be triggered by provocations or hasty, contradictory declarations on the part of movements whose strategy is, at times, to draw Westerners—and particularly the American global policeman—into endless wars. This greatly increases instability. During the Cold War, the triggering of a nuclear clash depended on interactions between a limited number of states. Today, nuclear weapons—previously regarded by some as a factor of stability, particularly because of the supposed rationality of those who possessed them—have become grounds for war. More generally there is the whole question of WMDs. The players involved are more numerous, and there is great distrust, both on account of the lack of rationality attributed by the United States to its new enemies and of their greater number and dispersal.

#### And, a model of preventative war justifies Chinese attacks on US missile defense

Stephen Walt 4, Robert and Renee Belfer Professor of International Affairs at Harvard, PhD in Political Science from UC Berkeley, October 1 2004, “The Strategic Environment,” Panel Discussion at “Preemptive Use of Force: A Reassessment,” Conference held by the Fletcher Forum on International Affairs, <http://www.brookings.edu/views/papers/daalder/daalder_fletcher.pdf>

Finally, as Ivo has already noted, there is this precedent problem. By declaring that preventive war is an effective policy option for us, we make it easier for others to see it as an effective policy option for them. Why can’t India attack Pakistan before it develops more nuclear weapons? Why can’t Turkey attack Iraqi Kurdistan to prevent the emergence of an independent state there? Why was it wrong for Serbia to take preventive action against the Kosovars, given that there was a guerilla army attacking Serbs in Kosovo, and given that the Serbs could see a long term threat to their national security if the Kosovar-Albanians got more and more politically organized and tried to secede? Why couldn’t a stronger China decide that America’s national missile defense program was a direct threat to their nuclear deterrent capability, and therefore decide to order a preventive commando strike against American radar sites in Alaska? Now this sounds wildly far-fetched, of course, but imagine the situation being reversed. Imagine if another country threatened our second strike capability, wouldn’t we have looked for some way to prevent that from happening? Of course we would. So again, we’re creating a precedent here.

#### Causes full-scale nuclear war

John W. Lewis 12, William Haas Professor of Chinese Politics, emeritus, at Stanford University, PhD from UCLA, and Xue Litai, research scholar at the Project on Peace and Cooperation in the Asian-Pacific Region at Stanford University’s Center for International Security and Cooperation, “Making China’s nuclear war plan,” Bulletin of the Atomic Scientists September/October 2012 vol. 68 no. 5 45-65, http://bos.sagepub.com/content/68/5/45.full

If the CMC authorizes a missile base to launch preemptive conventional attacks on an enemy, however, the enemy and its allies could not immediately distinguish whether the missiles fired were conventional or nuclear. From their perspective, the enemy forces could justifiably launch on warning and retaliate against all the command-and-control systems and missile assets of the Chinese missile launch base and even the overall command-and-control system of the central Second Artillery headquarters. In the worst case, a self-defensive first strike by Chinese conventional missiles could end in the retaliatory destruction of many Chinese nuclear missiles and their related command-and-control systems. That disastrous outcome would force the much smaller surviving and highly vulnerable Chinese nuclear missile units to fire their remaining missiles against the enemy’s homeland. In this quite foreseeable action-reaction cycle, escalation to nuclear war could become accelerated and unavoidable. This means that the double policies could unexpectedly cause, rather than deter, a nuclear exchange.

### Advantage 2 is Accountability

#### Accountability mechanisms that constrain the executive prevent drone overuse in Yemen

Benjamin R. Farley 12, JD from Emory University School of Law, former Editor-in-Chief of the Emory International Law Review, “Drones and Democracy: Missing Out on Accountability?” Winter 2012, 54 S. Tex. L. Rev. 385, lexis

Effective accountability mechanisms constrain policymakers' freedom to choose to use force by increasing the costs of use-of-force decisions and imposing barriers on reaching use-of-force decisions. The accountability mechanisms discussed here, when effective, reduce the likelihood of resorting to force (1) through the threat of electoral sanctioning, which carries with it a demand that political leaders explain their resort to force; (2) by limiting policymakers to choosing force only in the manners authorized by the legislature; and (3) by requiring policymakers to adhere to both domestic and international law when resorting to force and demanding that their justifications for uses of force satisfy both domestic and international law. When these accountability mechanisms are ineffective, the barriers to using force are lowered and the use of force becomes more likely.¶ Use-of-force decisions that avoid accountability are problematic for both functional and normative reasons. Functionally, accountability avoidance yields increased risk-taking and increases the likelihood of policy failure. The constraints imposed by political, supervisory, fiscal, and legal accountability "make[] leaders reluctant to engage in foolhardy military expeditions... . If the caution about military adventure is translated into general risk-aversion when it comes to unnecessary military engagements, then there will likely be a distributional effect on the success rates of [democracies]." n205 Indeed, this result is predicted by the structural explanation of the democratic peace. It also explains why policies that rely on covert action - action that is necessarily less constrained by accountability mechanisms - carry an increased risk of failure. n206 Thus, although accountability avoidance seductively holds out the prospect of flexibility and freedom of action for policymakers, it may ultimately prove counterproductive.¶ In fact, policy failure associated with the overreliance on force - due at least in part to lowered barriers from drone-enabled accountability avoidance - may be occurring already. Airstrikes are deeply unpopular in both Yemen n207 and Pakistan, n208 and although the strikes have proven critical [\*421] to degrading al-Qaeda and associated forces in Pakistan, increased uses of force may be contributing to instability, the spread of militancy, and the failure of U.S. policy objectives there. n209 Similarly, the success of drone [\*422] strikes in Pakistan must be balanced against the costs associated with the increasingly contentious U.S.-Pakistani relationship, which is attributable at least in part to the number and intensity of drone strikes. n210 These costs include undermining the civilian Pakistani government and contributing to the closure of Pakistan to NATO supplies transiting to Afghanistan, n211 thus forcing the U.S. and NATO to rely instead on several repressive central Asian states. n212 Arguably the damage to U.S.-Pakistan relations and the destabilizing influence of U.S. operations in Yemen would be mitigated by fewer such operations - and there would be fewer U.S. operations in both Pakistan and Yemen if U.S. policymakers were more constrained by use-of-force accountability mechanisms.¶ From a normative perspective, the freedom of action that accountability avoidance facilitates represents the de facto concentration of authority to use force in the executive branch. While some argue that such concentration of authority is necessary or even pragmatic in the current international environment, 168 it is anathema to the U.S. constitutional system. Indeed, the founding generation’s fear of foolhardy military adventurism is one reason for the Constitution’s diffusion of use-of-force authority between the Congress and the President. 169 That generation recognized that a President vested with an unconstrained ability to go to war is more likely to lead the nation into war.

#### Judicial review is key to prevent mistakes – executive targeting decisions are inevitably flawed and violent

Ahmad Chehab 12, Georgetown University Law Center, “RETRIEVING THE ROLE OF ACCOUNTABILITY IN THE TARGETED KILLINGS CONTEXT: A PROPOSAL FOR JUDICIAL REVIEW,” March 30 2012, abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2031572

The practical, pragmatic justification for the COAACC derives largely from considering social psychological findings regarding the skewed potential associated with limiting unchecked decision-making in a group of individuals. As an initial point, psychologists have long pointed out how individuals frequently fall prey to cognitive illusions that produce systematic errors in judgment.137 People simply do not make decisions by choosing the optimal outcome from available alternatives, but instead employ shortcuts (i.e., heuristics) for convenience.138 Cognitive biases like groupthink can hamper effective policy deliberations and formulations.139 Groupthink largely arises when a group of decision-makers seek conformity and agreement, thereby avoiding alternative points of view that are critical of the consensus position.140 This theory suggests that some groups—particularly those characterized by a strong leader, considerable internal cohesion, internal loyalty, overconfidence, and a shared world view or value system—suffer from a deterioration in their capacity to engage in critical analysis.141 Many factors can affect such judgment, including a lack of crucial information, insufficient timing for decision-making, poor judgment, pure luck, and/or unexpected actions by adversaries.142 Moreover, decision-makers inevitably tend to become influenced by irrelevant information,143 seek out data and assessments that confirm their beliefs and personal hypotheses notwithstanding contradictory evidence,144 and “[i]rrationally avoid choices that represent extremes when a decision involves a trade-off between two incommensurable values.”145 Self-serving biases can also hamper judgment given as it has been shown to induce well-intentioned people to rationalize virtually any behavior, judgment or action after the fact.146 The confirmation and overconfidence bias, both conceptually related to groupthink, also result in large part from neglecting to consider contradictory evidence coupled with an irrational persistence in pursuing ideological positions divorced from concern of alternative viewpoints.147¶ Professor Cass Sunstein has described situations in which groupthink produced poor results precisely because consensus resulted from the failure to consider alternative sources of information.148 The failures of past presidents to consider alternative sources of information, critically question risk assessments, ensure neutral-free ideological sentiment among those deliberating,149 and/or generally ensure properly deliberated national security policy has produced prominent and devastating blunders,150 including the Iraq War of 2003,151 the Bay of Pigs debacle in the 1960’s,152 and the controversial decision to wage war against Vietnam.153¶ Professor Sunstein also has described the related phenomenon of “group polarization,” which includes the tendency to push group members toward a “more extreme position.”154 Given that both groupthink and group polarization can lead to erroneous and ideologically tainted policy positions, the notion of giving the President unchecked authority in determining who is eligible for assassination can only serve to increase the likelihood for committing significant errors.155 The reality is that psychological mistakes, organizational ineptitude, lack of structural coherence and other associated deficiencies are inevitable features in Executive Branch decision-making.¶ D. THE NEED FOR ACCOUNTABILITY CHECKS¶ To check the vices of groupthink and shortcomings of human judgment, the psychology literature emphasizes a focus on accountability mechanisms in which a better reasoned decision-making process can flourish.156 By serving as a constraint on behavior, “accountability functions as a critical norm-enforcement mechanism—the social psychological link between individual decision makers on the one hand and social systems on the other.”157 Such institutional review can channel recognition for the need by government decision-makers to be more self-critical in policy targeted killing designations, more willing to consider alternative points of view, and more willing to anticipate possible objections.158 Findings have also shown that ex ante awareness can lead to more reasoned judgment while also preventing tendentious and ideological inclinations (and political motivations incentivized and exploited by popular hysteria and fear).159¶ Requiring accounting in a formalized way prior to engaging in a targeted killing—by providing, for example, in camera review, limited declassification of information, explaining threat assessments outside the immediate circle of policy advisors, and securing meaningful judicial review via a COAACC-like tribunal—can promote a more reliable and informed deliberation in the executive branch. With process-based judicial review, the COAACC could effectively reorient the decision to target individuals abroad by examining key procedural aspects—particularly assessing the reliability of the “terrorist” designation—and can further incentivize national security policy-makers to engage in more carefully reasoned choices and evaluate available alternatives than when subject to little to no review.

#### Overuse of targeted killings in Yemen strengthens AQAP and fuels instability

Danielle Wiener-Bronner 12/13/13, staff writer at the Wire and former Web Editor for Reuters, “Latest Drone Strikes Shows How U.S. Strategy in Yemen Is Backfiring,” http://www.thewire.com/global/2013/12/yemen-drones/356111/

Targeted drone killings are defended by the United States as means to combat al-Qaeda in the most effective way possible. If attacks are carried out correctly, they should minimize civilian casualties, eliminate risk to our own forces, and remove dangerous militant operatives, ideally dismantling terrorist groups from a safe distance.¶ But if the attacks are not carried out correctly, as they often aren't, the results can backfire, which is exactly what's been happening in Yemen, according to Reuters: ¶ Tribal leaders, who have a lot of influence within Yemen's complex social structure, warn of rising sympathy for al Qaeda. Awad Ahmed Mohsen from Majallah, a southern village hit by a drone strike that killed dozens in 2009, told Reuters that America had brought hatred with its drones. Asked if more people joined al Qaeda in the wake of attacks that killed civilians, Mohsen said: "Definitely. And even those who don't join, now sympathize with al Qaeda because of these strikes, these violations. Any American they see, they exact revenge, even if it's a civilian."¶ On Thursday, 14 Yemeni civilians were killed by a U.S. drone strike that mistakenly targeted a wedding convoy, according to Yemeni national security officials. Another official, however, said AQAP militants may have been traveling with the wedding party, but in either case it seems that civilians were not the original targets have been killed. The CIA didn't comment on the strike, per standard procedure. The attack threatens to undo the U.S.'s efforts to scale back its drone program, while making it more palatable to the countries it affects.¶ Reuters reports that al-Qaeda in the Arabian Peninsula (AQAP) has started traveling in smaller groups to avoid the aerial strikes, which may actually make it more difficult to track their motions. And the strikes are angering some Sunni Muslims upset about strikes that kill their supporters, rather than anti-government Shi'ite rebels, fueling sectarian tensions which are already high in the region.¶ If those killed in this week's attack are confirmed to be civilians, according to the Associated Press, it could mean a surge of anti-American sentiment in Yemen: ¶ Civilian deaths have bred resentments on a local level, sometimes undermining U.S. efforts to turn the public against the militants. The backlash in Yemen is still not as large as in Pakistan, where there is heavy pressure on the government to force limits on strikes — but public calls for a halt to strikes are starting to emerge.¶ In May, President Obama promised to increase transparency on the drone strike program and enhance guidelines on their use. But the Bureau of Investigative Journalism found in November that the six months following Obama's speech actually saw an increase of drone strike casualties in Yemen and Pakistan. ¶ Human Rights Watch and Amnesty International reported in October that civilian casualties of drone strikes are higher than the U.S. admits. Around the same time, a U.N. human rights investigator said 400-600 of the 2,200 people killed by drones in the past decade were noncombatants. And in 2012, reports emerged that the Yemeni government works to help the U.S. hide it deadly errors. ¶ Data on drone strikes, like all counter-terrorism efforts, is necessarily shrouded in mystery, making it difficult to measure success. But if drone strikes continue to indiscriminately kill civilians, moderates in Yemen may be driven towards more extremist positions. Even governments working with Washington to coordinate the strikes could turn against the U.S. if drone casualties are not scaled back or eliminated.

#### AQAP is strengthening now---they’re regrouping

UPI 1/22, “Report: Al Qaeda systematically assassinating Yemen's intelligence officers,” http://www.albawaba.com/news/yemen-al-qaeda-549282

Dozens of top intelligence and military officers have been assassinated in recent months in a savage campaign widely attributed to jihadists while complex attacks have been conducted against key military installations, all indicating Al Qaeda in the Arabian Peninsula is still a force with which to be reckoned.¶ The group, considered the most dangerous of Al Qaeda's affiliates from the badlands of northern Pakistan to Morocco, includes some of the network's most effective commanders, bomb-makers and ideologues.¶ Despite heavy losses, including several important leaders, from U.S. airstrikes in the last couple of years, AQAP remains a coherent force that counterinsurgency analysts say is steadily regrouping.¶ In 2012, the Yemeni military, heavily supported by U.S. airstrikes and equipment, drove AQAP out of the jihadist emirate it had established in south Yemen's Abyan province by exploiting a seething separatist campaign in the region.¶ But now, the analysts say, AQAP has moved into the eastern province of Hadramaut, which covers a third of the impoverished country, to establish a new base of operations under veteran jihadist Nasir al-Wuhayshi, Osama bin Laden's personal secretary in the 1990s.

#### Recruitment is key

John Masters 8/22/13, Deputy Editor @ the Council on Foreign Relations, “Al-Qaeda in the Arabian Peninsula (AQAP),” CFR Backgrounder, http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369#p6

The militant Islamist group al-Qaeda in the Arabian Peninsula (AQAP) was formed in January 2009 through a union of the Saudi and Yemeni branches of al-Qaeda. Jihadist antecedents in the region date to the early 1990s, when thousands of mujahedeen returned to Yemen after fighting the Soviet occupation in Afghanistan. Analysts rate the Yemen-based group as the most lethal Qaeda franchise, carrying out a domestic insurgency while maintaining its sights on striking Western targets. As the ranks of so-called "al-Qaeda central" in Pakistan have thinned, the umbrella organization's core may shift to Yemen. In August 2013, indications of an AQAP-sponsored plot led to the closure of more than two dozen U.S. diplomatic facilities across the Middle East, Africa, and South Asia.¶ Yemen, long a fractured and fragile country, is increasingly so since the ouster of President Ali Abdullah Saleh in February 2012. AQAP has exploited the instability, establishing a domestic insurgency based in the south. Meanwhile, the United States has expanded counterterrorism operations—particularly drone strikes—in the area. Experts question whether President Abd Rabbu Mansour Hadi's transitional government can pull back the impoverished country from the brink of failure.¶ Members of Ansar al-ShariaMembers of Ansar al-Sharia are seen near a tank taken from the army, as they guard a road leading to the southern Yemeni town of Jaar (Courtesy Reuters).¶ A Legacy of Jihad¶ In the late 1980s, the Saleh regime fostered jihad in what was then North Yemen by repatriating thousands of Yemeni nationals who had fought the Soviets in Afghanistan. Saleh dispatched these mujahadeen to fight the Soviet-backed Marxist government of South Yemen in a successful bid for unification, and subsequently, to crush southern secessionists.¶ The returning Yemenis were joined by other Arab veterans of the Afghan war, foremost among them Osama bin Laden, who advocated a central role for Yemen in global jihad. A corps of jihadists who had trained under bin Laden in Afghanistan formed the militant group Islamic Jihad in Yemen (1990-1994), one of several AQAP predecessors. Other such groups include the Army of Aden Abyan (1994-1998) and al-Qaeda in Yemen, or AQY (1998-2003).¶ In October 2000, a skiff piloted by two members of AQY detonated several hundred pounds of explosives into the hull of the USS Cole, which was moored in the port of Aden. Seventeen U.S. servicemen were killed. Two years later, another suicide bombing orchestrated by AQY, on the French oil tanker M/V Limburg, killed one crew member and further highlighted the threat to Western interests in the region. Several militants involved in the Limburg plot would eventually hold top leadership positions in AQAP.¶ Following the Cole bombing and the al-Qaeda-led attacks on September 11, 2001, the Bush administration pressed the Saleh government to begin aggressive counterterrorism operations against AQY. Many analysts believe Saleh may have stoked the jihadist threat—perhaps facilitating prison escapes of convicted terrorists—to ensure Western backing for his embattled regime, which viewed northern insurgents and southern secessionists as a greater threat than al-Qaeda.¶ Washington dispatched Special Forces and intelligence personnel to Yemen to aid the counterterrorism campaign. A U.S. drone strike in 2002, the first such operation in the region, killed AQY's leader, Abu Ali al-Harithi. By the end of 2003, AQY faced a precipitous membership decline.¶ Resiliency¶ In February 2006, twenty-three convicted terrorists escaped from a high-security prison in the capital of Sana'a, a turning point for al-Qaeda in the region. Many of the escapees worked to "resurrect al-Qaeda from the ashes" (PDF) and launch a fresh campaign of attacks. Among them was Nasser al-Wuhayshi, who today leads AQAP.¶ In late 2008, a crackdown by the Saudi government led remnants of the local al-Qaeda franchise there to flee across the border and unite with the resurgent jihad in Yemen. The two branches merged in 2009.¶ The U.S. State Department estimates the organization has "close to a thousand members." This represents dramatic growth from some two-to-three-hundred members in 2009, Yemen expert Gregory Johnsen notes, even as so-called al-Qaeda central, based in Pakistan, has declined.¶ AQAP has claimed responsibility for numerous attacks in the region since 2006. These have included the failed August 2009 assassination attempt on Saudi prince Mohammed bin Nayef; an attack on the U.S. in Sana'a in 2008; attacks on Italian and British embassies; suicide bombings targeting Belgian tourists in January 2008 and Korean tourists in March 2009; bombings of oil pipelines and production facilities; and the bombing of a Japanese oil tanker in April 2008. In May 2012, a suicide bomber killed more than ninety Yemeni soldiers rehearsing for a military parade in the capital of Sana'a, the largest attack since Hadi assumed power in early 2012.¶ AQAP has also been implicated in plots on the U.S. homeland, including Umar Farouk Abdulmutallab's failed 2009 Christmas Day bombing, Faisal Shahzad's attempted 2010 Times Square bombing, and the foiled May 2012 Detroit airliner bomb plot.¶ More than half of the 166 prisoners held in the U.S. military prison at Guantanamo Bay are Yemenis, and President Barack Obama's long-standing pledge to shut down the facility is contingent on repatriating them. But some U.S. lawmakers have objected, raising concern about the prisoners' return to the battlefield through detention and reintegration programs.¶ An Effective Propaganda¶ The primary goals of AQAP are consistent with the principles of militant jihad, which aims to purge Muslim countries of Western influence and replace secular "apostate" governments with fundamentalist Islamic regimes observant of sharia law. Associated AQAP objectives include overthrowing the regime in Sana'a; assassinating Western nationals and their allies, including members of the Saudi royal family; striking at related interests in the region, such as embassies and energy concerns; and attacking the U.S. homeland.¶ The group has also mastered recruitment through propaganda and media campaigns. A bimonthly AQAP magazine in Arabic, Sada al-Malahim ("The Echo of Battles"), is tailored to a Yemeni audience and offers theological support and praise for jihadists. The U.S.-born Anwar al-Awlaki and Pakistani-American Samir Khan were central figures in AQAP's production of propaganda aimed at Western audiences. Though they were killed in an October 2011 U.S. drone strike, their English-language propaganda magazine Inspire continues to be published. U.S. Major Nidal Hasan exchanged emails with Awlaki prior to his shooting rampage at the U.S. Army's Fort Hood in 2009.¶ Analysts say that AQAP's messaging attracts recruits by "minimiz[ing] global jihad while emphasizing national struggle," focusing on jihad as an answer to local grievances while remaining focused on what jihadists call the "far enemy"—the United States, particularly for its unholy alliance with Saudi Arabia.

#### Several Impacts:

#### 1st is Saudi Arabia

#### Strengthened AQAP undermines the Saudi regime

Colonel Hassan Abosaq 12, US Army War College, master of strategic studies degree candidate, 2012, "The Implications of Unstable on Saudi Arabia," Strategy Research Project, www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA560581

AQAP has been vociferous in its opposition to the Saudi regime, and is likely to continue targeting the Kingdom, particularly its oil installations and members of the royal family. In August 2009, an AQAP member attempted to assassinate Prince Mohammed bin Naif, the Saudi Assistant Interior Minister for security affairs. The prince’s attacker was trained in and launched his attack from Yemen, confirming to the Saudis that instability in Yemen poses a security threat to Saudi Arabia. A strengthened AQAP in Yemen is certain to try to put pressure on Saudi Arabia and to strike Saudi targets. AQAP’s military chief, Qasin al-Raymi, warned the Saudi Leadership in July 2011 that they are still regarded as apostates. And he specifically placed King Abdullah, the late Crown Prince Sultan, Interior Minister Prince Naif, and his son Mohammed Bin Naif on the target list.21 In March 2010, Saudi Arabia foiled several planned attacks on oil installation with the arrest of more than 100 suspected al-Qaeda militants. The arrests included 47 Saudis, 51 Yemenis, a Somali, a Bangladeshi, and an Eritrean.22 The wider domestic strife in Yemen has provided AQAP with some breathing space. More worrisome for Saudi Arabia is the increased lawlessness within Yemen. Not only does this provide the space that al-Qaeda needs to regroup, train, recruit, but it also deflects the state resources away from counterterrorism operations. Saudi Arabia has for years been working to infiltrate al-Qaeda in its unstable neighbor to south, Yemen. Saudi Arabia has also been giving Yemen a great deal of assistance to counterterrorism and it is worrying to the Saudis to see all of that assistance diverted from the purposes for which it was intended. In June 2011, AQAP leaped into the security vacuum created by Yemen’s political volatility, and 63 al-Qaeda in the Arabian Peninsula fighters escaped from a Yemeni prison.23 This exemplifies how Yemeni instability emboldens this lethal al-Qaeda affiliate. As the Yemeni military consolidates its strength in an attempt to maintain state control and fight two insurgencies and oppress the protesters, AQAP has further expanded its safe haven in the country’s interior, further increasing their operational capacity. This organization has not only attacked police, foreigners, and diplomatic missions within the country, but also served as a logistic base for acts of terrorism abroad. Yemen also has become the haven for jihad militants not just from Yemen and Saudi Arabia, but from all over the world which includes some Arabs, Americans, Europeans, Africans and others. Al-Qaeda camps, where terrorists from all over the world train are also situated in Yemen. The growing anarchy and al-Qaeda presence could spill over into Saudi Arabia.

#### That destabilizes the Middle East

Anthony Cordesman 11, Arleigh A. Burke Chair in Strategy at CSIS, former director of intelligence assessment in the Office of the Secretary of Defense, former adjunct prof of national security studies at Georgetown, PhD from London University, Feb 26 2011, “Understanding Saudi Stability and Instability: A Very Different Nation,” http://csis.org/publication/understanding-saudi-stability-and-instability-very-different-nation

History scarcely means we can take Saudi stability for granted. Saudi Arabia is simply too critical to US strategic interests and the world. Saudi petroleum exports play a critical role in the stability and growth of a steadily more global economy, and the latest projections by the Department of Energy do not project any major reductions in the direct level of US dependence on oil imports through 2025.¶ Saudi Arabia is as important to the region’s security and stability as it is to the world’s economy. It is the key to the efforts of the Gulf Cooperation Council to create local defenses, and for US strategic cooperation with the Southern Gulf states. It plays a critical role as a counterbalance to a radical and more aggressive Iran, it is the source of the Arab League plan for a peace with Israel, and it has become a key partner in the war on terrorism. The US strategic posture in the Middle East depends on Saudi Arabia having a friendly and moderate regime.

#### Global nuke war

Primakov 9 [September, Yevgeny, President of the Chamber of Commerce and Industry of the Russian Federation; Member of the Russian Academy of Sciences; member of the Editorial Board of Russia in Global Affairs. This article is based on the scientific report for which the author was awarded the Lomonosov Gold Medal of the Russian Academy of Sciences in 2008, “The Middle East Problem in the Context of International Relations”]

The Middle East conflict is unparalleled in terms of its potential for spreading globally. During the Cold War, amid which the Arab-Israeli conflict evolved, the two opposing superpowers directly supported the conflicting parties: the Soviet Union supported Arab countries, while the United States supported Israel. On the one hand, the bipolar world order which existed at that time objectively played in favor of the escalation of the Middle East conflict into a global confrontation. On the other hand, the Soviet Union and the United States were not interested in such developments and they managed to keep the situation under control. The behavior of both superpowers in the course of all the wars in the Middle East proves that. In 1956, during the Anglo-French-Israeli military invasion of Egypt (which followed Cairo’s decision to nationalize the Suez Canal Company) the United States – contrary to the widespread belief in various countries, including Russia – not only refrained from supporting its allies but insistently pressed – along with the Soviet Union – for the cessation of the armed action. Washington feared that the tripartite aggression would undermine the positions of the West in the Arab world and would result in a direct clash with the Soviet Union. Fears that hostilities in the Middle East might acquire a global dimension could materialize also during the Six-Day War of 1967. On its eve, Moscow and Washington urged each other to cool down their “clients.” When the war began, both superpowers assured each other that they did not intend to get involved in the crisis militarily and that that they would make efforts at the United Nations to negotiate terms for a ceasefire. On July 5, the Chairman of the Soviet Government, Alexei Kosygin, who was authorized by the Politburo to conduct negotiations on behalf of the Soviet leadership, for the first time ever used a hot line for this purpose. After the USS *Liberty* was attacked by Israeli forces, which later claimed the attack was a case of mistaken identity, U.S. President Lyndon Johnson immediately notified Kosygin that the movement of the U.S. Navy in the Mediterranean Sea was only intended to help the crew of the attacked ship and to investigate the incident. The situation repeated itself during the hostilities of October 1973. Russian publications of those years argued that it was the Soviet Union that prevented U.S. military involvement in those events. In contrast, many U.S. authors claimed that a U.S. reaction thwarted Soviet plans to send troops to the Middle East. Neither statement is true. The atmosphere was really quite tense. Sentiments both in Washington and Moscow were in favor of interference, yet both capitals were far from taking real action. When U.S. troops were put on high alert, Henry Kissinger assured Soviet Ambassador Anatoly Dobrynin that this was done largely for domestic considerations and should not be seen by Moscow as a hostile act. In a private conversation with Dobrynin, President Richard Nixon said the same, adding that he might have overreacted but that this had been done amidst a hostile campaign against him over Watergate. Meanwhile, Kosygin and Foreign Minister Andrei Gromyko at a Politburo meeting in Moscow strongly rejected a proposal by Defense Minister Marshal Andrei Grechko to “demonstrate” Soviet military presence in Egypt in response to Israel’s refusal to comply with a UN Security Council resolution. Soviet leader Leonid Brezhnev took the side of Kosygin and Gromyko, saying that he was against any Soviet involvement in the conflict. The above suggests an unequivocal conclusion that control by the superpowers in the bipolar world did not allow the Middle East conflict to escalate into a global confrontation. After the end of the Cold War, some scholars and political observers concluded that a real threat of the Arab-Israeli conflict going beyond regional frameworks ceased to exist. However, in the 21st century this conclusionno longer conforms to the reality. The U.S. military operation in Iraq has changed the balance of forces in the Middle East. The disappearance of the Iraqi counterbalance has brought Iran to the fore as a regional power claiming a direct role in various Middle East processes. I do not belong to those who believe that the Iranian leadership has already made a political decision to create nuclear weapons of its own. Yet Tehran seems to have set itself the goal of achieving a technological level that would let it make such a decision (the “Japanese model”) under unfavorable circumstances. Israel already possesses nuclear weapons and delivery vehicles. In such circumstances, the absence of a Middle East settlement opens a dangerous prospect ofa nuclear collision in the region, which would have catastrophic consequences for the whole world**.** The transition to a multipolar world has objectively strengthened the role of states and organizations that are directly involved in regional conflicts, which increases the latter’s danger and reduces the possibility of controlling them. This refers, above all, to the Middle East conflict. The coming of Barack Obama to the presidency has allayed fears that the United States could deliver a preventive strike against Iran (under George W. Bush, it was one of the most discussed topics in the United States). However, fears have increased that such a strike can be launched *Yevgeny Primakov* 1 3 2 RUSSIA IN GLOBAL AFFAIRS VOL. 7 • No. 3 • JULY – SEPTEMBER• 2009 by Israel, which would have unpredictable consequences for the region and beyond. It seems that President Obama’s position does not completely rule out such a possibility.

#### Second is India

#### Safe haven in Yemen lets AQAP launch attacks on India

Shankar Roychowdhury 11, former Indian Chief of Army Staff and a former member of Parliament, Sept 6 2011, “India needs a 360° terror appraisal,” http://archive.asianage.com/columnists/india-needs-360-terror-appraisal-391

In this context, Al Qaeda and its emerging connections in Yemen have become very relevant for India.¶ Yemen’s predominantly tribal culture and harsh inaccessible terrain create an inherent insularity which, in many ways, makes the country an ideal sanctuary for terrorists. Yemen has, in fact, reportedly become the principal new destination for Pashtun and Punjabi Taliban fleeing intensifying attacks by American drones.¶ Al Qaeda in the Arabian Peninsula (AQAP) has gradually established itself here through a web of alliances with the local tribes, including some by intermarriages, particularly in the inaccessible mountains of the Shabwa province, and has now become a strong presence within the country.¶ There is every likelihood that Pakistan’s ISI has established contacts with the AQAP, though the organisation has been targeted by Saudi and Yemeni intelligence and military who consider Al Qaeda a threat to the ruling establishments.¶ Yemen was in the news because of reports that the AQAP was attempting to procure large quantities of castor beans for manufacturing ricin powder, an extremely lethal poison; it’s swiftly fatal if inhaled in even the most minute doses. These were then to be packed into small explosive dispenser packages and smuggled into the US and Europe, and exploded in crowded places like shopping malls, aircraft or subway stations. It would be a dirty chemical bomb from ingredients freely available in the open market, comparatively cheaper and much more accessible than even the smallest nuclear equivalent. Of course, there is much scepticism about the very feasibility of developing such a project in the primitive environments of Yemen, which is where the significance of a possible Pakistani connection with the AQAP comes in.¶ Consider this. Pakistan has already given a Dr A.Q. Khan to the illegal nuclear market.¶ Given the jihadi influence within the Pakistani scientific community, it is not at all impossible that another similar figure may emerge in that country in the illegal bio-chemical field as well.¶ The AQAP has demonstrated the capability to devise imaginative and ingenuous plans to carry out attacks in the heartlands of the US and western Europe, and some were even put into operation, but detected almost at the last minute.¶ In the past, numerous jihadi attacks have originated from Yemen, including suicide bombing of the US Navy warship USS Cole in Aden harbour in 2010, the attack on the French tanker Limburg, the failed attack on another US Navy warship The Sullivans in 2002, besides the attempted assassination of the Saudi anti-terrorist chief Prince Mohammad bin Nayef.¶ There was also the more bizarre case of an African passenger of Yemeni origin with plastic explosives sewn into his underwear who boarded an American commercial flight flying from Amsterdam and Detroit but failed to¶ set off the explosive when over American airspace. ¶ But fanciful or not, the US for one is certainly taking seriously the capabilities of the AQAP as a potential threat. American military aid and intelligence activities in Yemen, including strikes by American aircraft and drones, have been ramped up, and there are reports that a new American airbase for this purpose is under construction in a yet unspecified country in West Asia.¶ Threats to India’s national security can build up in any quarter, from any region of the world. India should have no doubts that it is very much on the AQAP’s target list, through local proxies like the LeT in Pakistan, including possible “ricin bomb” operations. So even as Mr Hazare wrestles with the threat of corruption to ensure good governance, India must take due note of other threats as well and exercise the requisite caution.

#### Causes Indo-Pak nuclear war

Juan C Zarate 11, senior adviser at the Center for Strategic and International Studies, visiting lecturer at Harvard University, Feb 20 2011, “An alarming South Asia powder keg,” http://www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021805662.html

Significant terrorist attacks in India, against Parliament in 2001 and in Mumbai in 2008, brought India and Pakistan to the brink of war. The countries remain deeply distrustful of each other. Another major strike against Indian targets in today's tinderbox environment could lead to a broader, more devastating conflict.¶ The United States should be directing political and diplomatic capital to prevent such a conflagration. The meeting between Indian and Pakistani officials in Bhutan this month - their first high-level sit-down since last summer - set the stage for restarting serious talks on the thorny issue of Kashmir.¶ Washington has only so much time. Indian officials are increasingly dissatisfied with Pakistan's attempts to constrain Lashkar-i-Taiba and remain convinced that Pakistani intelligence supports the group. An Indian intelligence report concluded last year that Pakistan's Inter-Services Intelligence Directorate was involved in the 2008 Mumbai attacks, and late last year the Indian government raised security levels in anticipation of strikes. India is unlikely to show restraint in the event of another attack.¶ Lashkar-i-Taiba may also feel emboldened since the assassination in early January of a moderate Punjabi governor muted Pakistani moderates and underscored the weakness of the government in Islamabad. The group does not want peace talks to resume, so it might act to derail progress. Elements of the group may see conflict with India as in their interest, especially after months of unrest in Kashmir. And the Pakistani government may not be able to control the monster it created.¶ A war in South Asia would be disastrous not just for the United States. In addition to the human devastation, it would destroy efforts to bring stability to the region and to disrupt terrorist havens in western Pakistan. Many of the 140,000 Pakistani troops fighting militants in the west would be redeployed east to battle Indian ground forces. This would effectively convert tribal areas bordering Afghanistan into a playing field for militants. Worse, the Pakistani government might be induced to make common cause with Lashkar-i-Taiba, launching a proxy fight against India. Such a war would also fuel even more destructive violent extremism within Pakistan.¶ In the worst-case scenario, an attack could lead to a nuclear war between India and Pakistan. India's superior conventional forces threaten Pakistan, and Islamabad could resort to nuclear weapons were a serious conflict to erupt. Indeed, The Post reported that Pakistan's nuclear weapons and capabilities are set to surpass those of India.

#### Extinction

Greg Chaffin 11, Research Assistant at Foreign Policy in Focus, July 8, 2011, “Reorienting U.S. Security Strategy in South Asia,” online: http://www.fpif.org/articles/reorienting\_us\_security\_strategy\_in\_south\_asia

A nuclear conflict in the subcontinent would have disastrous effects on the world as a whole. In a January 2010 paper published in Scientific American, climatology professors Alan Robock and Owen Brian Toon forecast the global repercussions of a regional nuclear war. Their results are strikingly similar to those of studies conducted in 1980 that conclude that a nuclear war between the United States and the Soviet Union would result in a catastrophic and prolonged nuclear winter, which could very well place the survival of the human race in jeopardy. In their study, Robock and Toon use computer models to simulate the effect of a nuclear exchange between India and Pakistan in which each were to use roughly half their existing arsenals (50 apiece). Since Indian and Pakistani nuclear devices are strategic rather than tactical, the likely targets would be major population centers. Owing to the population densities of urban centers in both nations, the number of direct casualties could climb as high as 20 million. ¶ The fallout of such an exchange would not merely be limited to the immediate area. First, the detonation of a large number of nuclear devices would propel as much as seven million metric tons of ash, soot, smoke, and debris as high as the lower stratosphere. Owing to their small size (less than a tenth of a micron) and a lack of precipitation at this altitude, ash particles would remain aloft for as long as a decade, during which time the world would remain perpetually overcast. Furthermore, these particles would soak up heat from the sun, generating intense heat in the upper atmosphere that would severely damage the earth’s ozone layer. The inability of sunlight to penetrate through the smoke and dust would lead to global cooling by as much as 2.3 degrees Fahrenheit. This shift in global temperature would lead to more drought, worldwide food shortages, and widespread political upheaval.

#### Third is Arms Control

#### Yemen instability undercuts the effectiveness of Middle East arms control measures---has global ripple effects

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Yemen’s ongoing domestic crisis has profound regional and global implications. This is due to the country’s unique combination of a geostrategically sensitive location, the stubborn weakness of state institutions, linkages with transnational terrorism, a prominent role in the regional weapons market, and, crucially, the suspected existence and use of nerve gas. These inter- related challenges might constitute a serious impediment to the short-term success and long-term sustainability of the Middle East Conference (MEC). This gathering on the establishment of a regional zone free of weapons of mass destruction (WMD) and their delivery vehicles (DVs) was mandated by the 2010 Review Conference of the Nuclear Non-Proliferation Treaty (NPT). In this context, Yemen’s ongoing domestic crisis thus requires urgent attention by policy-makers in the region and beyond.¶ The Importance of Yemen in the Context of the Middle East Conference¶ While in a geographical and political sense Yemen is far from being a central actor in the envisioned MEC, its political future could easily shape the gathering on several levels. First, the Middle East Conference aims at establishing a WMD/DVs Free Zone. On the one hand, Yemen is a party to all three legal documents banning weapons of mass destruction: the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention (BTWC), and the Chemical Weapons Convention (CWC). In addition, Sana’a has embraced the Gulf Cooperation Council’s (GCC) call for a Gulf WMD Free Zone, independent of Israeli nuclear policy. On the other hand, when it comes to the problématique of WMD and proliferation, Yemen might store chemical weapons, depending on whether rumors about the use of nerve gas against anti- government protesters in early 2011 turn out to be true. In addition, Yemen imported various WMD-capable aircraft and missiles and probably still operates most of them (see Table No. 1). In the aircraft realm, Yemeni decision-makers from the North, the South, and the unified country alike have mostly received Soviet/Russian fighter jets and bombers. 1¶ The current level of instability and the threat of further deterioration could thus spoil any serious arms control effort in Yemen. This is particularly troublesome since the country, given its history and affiliation with the Arab League, will have to be part of far-reaching regional disarmament initiatives. The prospect of an Arab state with an uncontrolled chemical arsenal is likely to affect Israeli and Iranian calculations with regard to the MEC. Both states are suspicious of the Arab League and tensions between Iran and Saudi Arabia, which is particularly influential in Yemen, have recently worsened. ¶ Second, with a long history as one of the region’s eminent weapons markets, Yemen has the potential to serve as a major gateway for illicit weapons, both conventional and unconventional, entering the Arab peninsula and other parts of the Arab East. If the situation escalates, states with an interest in such technology might, for instance, try to obtain missiles and their spare parts or attempt to gain access to sensitive material from the country’s suspected chemical warheads. This could contribute to the proliferation of delivery systems as well as WMD thereby undermining the MEC. In 2011, protesters seized an army base in Sana’a, while Al-Qaeda in the Arab Peninsula (AQAP) has, on a frequent basis, been able to temporarily control several cities and launch deadly assaults on military bases in the southern province of Abyan. Such developments could offer AQAP the chance to use existing dual-use laboratories or even to build their own facilities capable of producing biological and chemical material in remote areas under their control.¶ Third, Yemen has the potential to play a more prominent role in the ongoing tensions between Saudi Arabia and Iran. Riyadh has a long history of attempts to shape the course of political events in Yemen with which it shares a 1,800 km-long border. Saudi Arabia’s different reactions to domestic calls for change in Bahrain and Syria have made clear that it is viewing the ‘Arab Spring’ primarily through the lens of its long-running conflict with Iran. From a Saudi point of view, instability in Yemen opens up the specter of increased Iranian influence at a time when Tehran’s foothold in the Arab world’s northern tier comes under strain in the context of the popular uprising against the Assad regime in Syria.¶ Fourth, a number of narrowly foiled terrorist attacks on U.S. targets and the 2009 Fort Hood shooting in Texas have shifted global attention towards Yemen’s status as the home to Al-Qaeda in the Arab Peninsula. Continuing instability in Yemen allows AQAP to regroup and pose a direct threat to the security of Saudi Arabia and other countries on the Arab peninsula. It also puts AQAP into a position to intensify its support for the ‘home-grown’ attempted terrorist attacks the United States has witnessed over the last couple of years. In short, Yemen’s instability has the potential to allow transnational actors to undermine the security arrangements which the region’s state actors might contemplate as part of the envisioned MEC.

#### Arms control is key to prevent extinction

Harold Müller 2k, Director of the Peace Research Institute-Frankfurt and Professor of International Relations at Goethe University, “Compliance Politics: A Critical Analysis of Multilateral Arms Control Treaty Enforcement”, The Nonproliferation Review, 7(2), Summer 2000

In this author's view,3 at least four distinct missions continue to make arms control, disarmament, and nonproliferation agreements useful, even indispensable parts of a stable and reliable world security structure: • As long as the risk of great power rivalry and competition exists—and it exists today—constructing barriers against a degeneration of this competition into major violence remains a pivotal task of global security policy. Things may be more complicated than during the bipolar age since asymmetries loom larger and more than one pair of competing major powers may exist. With overlapping rivalries among these powers, arms races are likely to be interconnected, and the stability of any one pair of rivals might be affected negatively by developments in other dyads. Because of this greater risk of instability, the increased political complexity of the post-bipolar world calls for more rather than less arms control. For these competitive relationships, stability or stabilization remains a key goal, and effectively verified agreements can contribute much to establish such stability. • Arms control also has a role to play in securing regional stability. At the regional level, arms control agreements can create balances of forces that reassure regional powers that their basic security is certain, and help build confidence in the basically non-aggressive policies of neighbors. Over time, a web of interlocking agreements may even create enough of a sense of security and confidence to overcome past confrontations and enable transitions towards more cooperative relationships. • At the global level, arms limitation or prohibition agreements, notably in the field of weapons of mass destruction, are needed to ban existential dangers for global stability, ecological safety, and maybe the very survival of human life on earth. In an age of increasing interdependence and ensuing complex networks that support the satisfaction of basic needs, international cooperation is needed to secure the smooth working of these networks. Arms control can create underlying conditions of security and stability that reduce distrust and enable countries to commit themselves to far-reaching cooperation in other sectors without perceiving undesirable risks to their national security. Global agreements also affect regional balances and help, if successful, to reduce the chances that regional conflicts will escalate. Under opportune circumstances, the normative frameworks that they enshrine may engender a feeling of community and shared security interests that help reduce the general level of conflict and assist in ushering in new relations of global cooperation.

#### Middle East arms control solves US-Russia disputes over missile defense---key to relations

Michael Elleman 12, senior fellow for regional security cooperation at the International Institute for Strategic Studies, May 2012, “Banning Long-Range Missiles in the Middle East: A First Step for Regional Arms Control,” http://www.armscontrol.org/act/2012\_05/Banning\_Long-Range\_Missiles\_In\_the\_Middle\_East\_A\_First\_Step\_For\_Regional\_Arms\_Control

The international community, perhaps led by China, Russia, the United States, and key member states of the European Union, should seek to persuade countries in the Middle East to negotiate and agree to a verifiable regime that prohibits the possession or flight testing of intermediate-range and intercontinental ballistic missiles. As outlined above, a combination of incentive packages and diplomatic pressure almost certainly will be required, but the precise nature of the inducements will not become clear until the key parties from the Middle East begin negotiations and define their objectives and concerns.¶ Russia and the United States could begin by offering to create jointly the foundations of a regional monitoring authority whose initial purpose would be to house data on missile and space launches from the region. At first, the database would consist of information gathered by Russian and U.S. sensors and might later be augmented by voluntary submissions to the monitoring authority from countries within the region. The transparency created by the monitoring authority could be used to build a minimal level of trust, from which negotiations on the basic parameters of a ban on long-range missiles could begin.¶ In addition to the diplomatic benefits of contributing to the successful conclusion of a sensitive negotiation, Russia and the United States could gain security benefits from participating. A verifiable ban on long-range missiles would remove most or all of the basis for the planned deployment of the later phases of the U.S.-NATO missile defense system in Europe. U.S.-Russian disagreements over European missile defense currently are an irritant to U.S.-Russian relations and, in particular, are a major obstacle to further arms reductions.

#### US-Russia relations solve nuke war

Allison 11 (Graham, 10/30, Director of the Belfer Center for Science and International Affairs at Harvard’s Kennedy School of Government, “10 reasons why Russia still matters,” http://dyn.politico.com/printstory.cfm?uuid=161EF282-72F9-4D48-8B9C-C5B3396CA0E6)

That central point is that Russia matters a great deal to a U.S. government seeking to defend and advance its national interests. Prime Minister Vladimir Putin’s decision to return next year as president makes it all the more critical for Washington to manage its relationship with Russia through coherent, realistic policies. No one denies that Russia is a dangerous, difficult, often disappointing state to do business with. We should not overlook its many human rights and legal failures. Nonetheless, Russia is a player whose choices affect our vital interests in nuclear security and energy. It is key to supplying 100,000 U.S. troops fighting in Afghanistan and preventing Iran from acquiring nuclear weapons. Ten realities require U.S. policymakers to advance our nation’s interests by engaging and working with Moscow. First, Russia remains the only nation that can erase the United States from the map in 30 minutes. As every president since John F. Kennedy has recognized, Russia’s cooperation is critical to averting nuclear war. Second, Russia is our most consequential partner in preventing nuclear terrorism. Through a combination of more than $11 billion in U.S. aid, provided through the Nunn-Lugar [CTR] Cooperative Threat Reduction program, and impressive Russian professionalism, two decades after the collapse of the “evil empire,” not one nuclear weapon has been found loose. Third, Russia plays an essential role in preventing the proliferation of nuclear weapons and missile-delivery systems. As Washington seeks to stop Iran’s drive toward nuclear weapons, Russian choices to sell or withhold sensitive technologies are the difference between failure and the possibility of success. Fourth, Russian support in sharing intelligence and cooperating in operations remains essential to the U.S. war to destroy Al Qaeda and combat other transnational terrorist groups. Fifth, Russia provides a vital supply line to 100,000 U.S. troops fighting in Afghanistan. As U.S. relations with Pakistan have deteriorated, the Russian lifeline has grown ever more important and now accounts for half all daily deliveries. Sixth, Russia is the world’s largest oil producer and second largest gas producer. Over the past decade, Russia has added more oil and gas exports to world energy markets than any other nation. Most major energy transport routes from Eurasia start in Russia or cross its nine time zones. As citizens of a country that imports two of every three of the 20 million barrels of oil that fuel U.S. cars daily, Americans feel Russia’s impact at our gas pumps. Seventh, Moscow is an important player in today’s international system. It is no accident that Russia is one of the five veto-wielding, permanent members of the U.N. Security Council, as well as a member of the G-8 and G-20. A Moscow more closely aligned with U.S. goals would be significant in the balance of power to shape an environment in which China can emerge as a global power without overturning the existing order. Eighth, Russia is the largest country on Earth by land area, abutting China on the East, Poland in the West and the United States across the Arctic. This territory provides transit corridors for supplies to global markets whose stability is vital to the U.S. economy. Ninth, Russia’s brainpower is reflected in the fact that it has won more Nobel Prizes for science than all of Asia, places first in most math competitions and dominates the world chess masters list. The only way U.S. astronauts can now travel to and from the International Space Station is to hitch a ride on Russian rockets. The co-founder of the most advanced digital company in the world, Google, is Russian-born Sergei Brin. Tenth, Russia’s potential as a spoiler is difficult to exaggerate. Consider what a Russian president intent on frustrating U.S. international objectives could do — from stopping the supply flow to Afghanistan to selling S-300 air defense missiles to Tehran to joining China in preventing U.N. Security Council resolutions.

### Solvency

#### The plan establishes legal norms and ensures compliance with the laws of war

Jonathan Hafetz 13, Associate Prof of Law at Seton Hall University Law School, former Senior Staff Attorney at the ACLU, served on legal teams in multiple Supreme Court cases regarding national security, “Reviewing Drones,” 3/8/2013, http://www.huffingtonpost.com/jonathan-hafetz/reviewing-drones\_b\_2815671.html

The better course is to ensure meaningful review after the fact. To this end, Congress should authorize federal damages suits by the immediate family members of individuals killed in drone strikes.¶ Such ex post review would serve two main functions: providing judicial scrutiny of the underlying legal basis for targeted killings and affording victims a remedy. It would also give judges more leeway to evaluate the facts without fear that an error on their part might leave a dangerous terrorist at large.¶ For review to be meaningful, judges must not be restricted to deciding whether there is enough evidence in a particular case, as they would likely be under a FISA model. They must also be able to examine the government's legal arguments and, to paraphrase the great Supreme Court chief justice John Marshall, "to say what the law is" on targeted killings.¶ Judicial review through a civil action can achieve that goal. It can thus help resolve the difficult questions raised by the Justice Department white paper, including the permissible scope of the armed conflict with al Qaeda and the legality of the government's broad definition of an "imminent" threat.¶ Judges must also be able to afford a remedy to victims. Mistakes happen and, as a recent report by Columbia Law School and the Center for Civilians in Conflict suggests, they happen more than the U.S. government wants to acknowledge.¶ Errors are not merely devastating for family members and their communities. They also increase radicalization in the affected region and beyond. Drone strikes -- if unchecked -- could ultimately create more terrorists than they eliminate.¶ Courts should thus be able to review lethal strikes to determine whether they are consistent with the Constitution and with the 2001 Authorization for Use of Military Force, which requires that such uses of force be consistent with the international laws of war. If a drone strike satisfies these requirements, the suit should be dismissed.

#### “Cause of action” creates a deterrent effect that makes officials think twice about drones---drawbacks of judicial review don’t apply

Stephen I. Vladeck 13, Professor of Law and Associate Dean for Scholarship at American University Washington College of Law, senior editor of the peer-reviewed Journal of National Security Law and Policy, Supreme Court Fellow at the Constitution Project, and fellow at the Center on National Security at Fordham University School of Law, JD from Yale Law School, Feb 27 2013, “DRONES AND THE WAR ON TERROR: WHEN CAN THE U.S.TARGET ALLEGED AMERICAN TERRORISTS OVERSEAS?” Hearing Before the House Committee on the Judiciary, http://www.lawfareblog.com/wp-content/uploads/2013/02/Vladeck-02272013.pdf

At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I believe that virtually all of these concerns could be mitigated. ¶ For starters, retrospective review doesn’t raise anywhere near the same concerns with regard to adversity or judicial competence. With respect to adversity, presumably those who are targeted in an individual strike could be represented as plaintiffs in a post-hoc proceeding, whether through their next friend or their heirs. And as long as they could state a viable claim for relief, it’s difficult to see any pure Article III problem with such a suit for retrospective relief.¶ As for competence, judges routinely review whether government officers acted in lawful self-defense under exigent circumstances (this is exactly what the Supreme Court’s 1985 decision in Tennessee v. Garner20 contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances—albeit not always ideally—the government’s interest in secrecy with the detainee’s ability to contest the evidence against him.21 Just as Guantánamo detainees are represented in their habeas proceedings by security-cleared counsel who must comply with court-imposed protective orders and security procedures,22 so too, the subjects of targeted killing operations could have their estates represented by security-cleared counsel, who would be in a far better position to challenge the government’s evidence and to offer potentially exculpatory evidence / arguments of their own. And although the Guantánamo procedures have been developed by courts on an ad hoc basis (a process that has itself been criticized by some jurists), 23 Congress might also look to provisions it enacted in 1996 in creating the little-known Alien Terrorist Removal Court, especially 8 U.S.C. § 1534,24 as a model for such proceedings. ¶ More to the point, it should also follow that courts would be far more able as a practical matter to review the relevant questions in these cases after the fact. Although the pure membership question can probably be decided in the abstract, it should stand to reason that the imminence and infeasibility-of-capture issues will be much easier to assess in hindsight—removed from the pressures of the moment and with the benefit of the dispassionate distance that judicial review provides. To similar effect, whether the government used excessive force in relation to the object of the attack is also something that can only reasonably be assessed post hoc.¶ In addition to the substantive questions, it will also be much easier for courts to review the government’s own internal procedures after they are employed, especially if the government itself is already conducting after-action reviews that could be made part of the (classified) record in such cases. Indeed, the government’s own analysis could, in many cases, go a long way toward proving the lawfulness vel non of an individual strike.¶ As I mentioned before, there would still be a host of legal doctrines that would likely get in the way of such suits. Just to name a few, there is the present (albeit, in my view, unjustified) hostility to judicially inferred causes of actions under Bivens; the state secrets privilege;and sovereign and official immunity doctrines. But I am a firm believer that, except where the President himself is concerned (where there’s a stronger argument that immunity is constitutionally grounded),25 each of these concerns can be overcome by statute—as at least some of them arguably have been in the context of the express damages actions provided for under FISA. 26 So long as Congress creates an express cause of action for nominal damages, and so long as the statute both (1) expressly overrides state secrets and immunity doctrines; and (2) replaces them with carefully considered procedures for balancing the secrecy concerns that would arise in many—if not most—of these cases, these legal issues would be vitiated. Moreover, any concerns about exposing to liability government officers who acted in good faith and within the scope of their employment can be ameliorated by following the model of the Westfall Act, and substituting the United States as the proper defendant in any suit arising out of such an operation.27¶ Perhaps counterintuitively, I also believe that after-the-fact judicial review wouldn’t raise anywhere near the same prudential concerns as those noted above. Leaving aside how much less pressure judges would be under in such cases, it’s also generally true that damages regimes don’t have nearly the same validating effect on government action that ex ante approval does. Otherwise, one would expect to have seen a dramatic upsurge in lethal actions by law enforcement officers after each judicial decision refusing to impose individual liability arising out of a prior use of deadly force. So far as I know, no such evidence exists.¶ Of course, damages actions aren’t a perfect solution here. It’s obvious, but should be said anyway, that in a case in which the government does act unlawfully, no amount of damages will make the victim (or his heirs) whole. It’s also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less public accountability for targeted killings than, ideally, we might want. Some might also object to this proposal as being unnecessary—that, given existing criminal laws and executive orders, there is already a sufficiently clear prohibition on unlawful strikes to render any such damages regime unnecessarily superfluous. ¶ At least as to this last objection, it bears emphasizing that the existing laws depend entirely upon the beneficence of the Executive Branch, since they assume both that the government will (1) willfully disclose details of unlawful operations rather than cover them up; and (2) prosecute its own in cases in which they cross the line. Given both prior practice and unconfirmed contemporary reports of targeted killing operations that appear to raise serious legality issues, such as “signature strikes,” it doesn’t seem too much of a stretch to doubt that these remedies will prove sufficient.¶ In addition, there are two enormous upsides to damages actions that, in my mind, make them a least-worst solution—even if they are deeply, fundamentally flawed:¶ First, if nothing else, the specter of damages, even nominal damages, should have a deterrent effect on future government officers, such that, if a targeted killing operation ever was carried out in a way that violated the relevant legal rules, there would be liability—and, as importantly, precedent—such that the next government official in a similar context might think twice, and might make sure that he’s that much more convinced that the individual in question is who the government claims, and that there’s no alternative to the use of lethal force. Second, at least where the targets of such force are U.S. citizens, I believe that there is a non-frivolous argument that the Constitution may even compel at least some form of judicial process. 28 Compared to the alternatives, nominal damages actions litigated under carefully circumscribed rules of secrecy may be the only way to balance all of the relevant private, government, and legal interests at stake in such cases.¶ \* \* \*¶ In his concurrence in the Supreme Court’s famous decision in the Steel Seizure case, Justice Frankfurter suggested that “The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”¶ 29 It seems to me, Mr. Chairman, that targeted killing operations by the Executive Branch present the legislature with two realistic choices: Congress could accept with minimal scrutiny the Executive Branch’s claims that these operations are carried out lawfully and with every relevant procedural safeguard to maximize their accuracy—and thereby open the door to the “unchecked disregard” of which Justice Frankfurter warned. Or Congress could require the government to defend those assertions in individual cases before a neutral magistrate invested with the independence guaranteed by the Constitution’s salary and tenure protections. So long as the government’s interests in secrecy are adequately protected in such proceedings, and so long as these operations really are consistent with the Constitution and laws of the United States, what does the government have to hide?

#### Ex post review creates a credible signal of compliance that restrains future executives

Kwame Holman 13, congressional correspondent for PBS NewsHour; citing Rosa Brooks, Prof of Law at Georgetown University Law Center, former Counselor to the Under Secretary of Defense for Policy, former senior advisor at the US Dept of State, “Congress Begins to Weigh In On Drone Strikes Policy,” http://www.pbs.org/newshour/rundown/2013/04/congress-begins-to-weigh-in-on-drone-strikes-policy.html

While some experts have argued for court oversight of drone strikes before they're carried out, Brooks sides with those who say that would be unwieldy and unworkable.¶ Brooks says however an administration that knows its strikes could face court review after the fact -- with possible damages assessed -- would be more responsible and careful about who it strikes and why.¶ "If Congress were to create a statutory cause of action for damages for those who had been killed in abusive or mistaken drone strikes, you would have a court that would review such strikes after the fact. [That would] create a pretty good mechanism that would frankly keep the executive branch as honest as we hope it is already and as we hope it will continue to be into administrations to come," Brooks said.¶ "It would be one of the approaches that would go a very long way toward reassuring both U.S. citizens and the world more generally that our policies are in compliance with rule of law norms."

#### Only judicial oversight can credibly verify compliance with the laws of war

Avery Plaw 7, Associate Prof of Political Science at the University of Massachusetts at Dartmouth, PhD in Political Science from McGill University, “Terminating Terror: The Legality, Ethics and Effectiveness of Targeting Terrorists,” Theoria: A Journal of Social and Political Theory, No. 114, War and Terror (December 2007), pp. 1-27

To summarize, the general policy of targeting terrorists appears to be defensible in principle in terms of legality, morality and effectiveness. However, some specific targetings have been indefensible and should be prevented from recurring. Critics focus on the indefensible cases and insist that these are best prevented by condemning the general policy. States which target terrorists and their defenders have insisted that self-defense provides a blanket justification for targeting operations. The result has been a stalemate over terrorist targeting harmful to both the prosecution of the war on terror and the credibility of international law. Yet neither advocates nor critics of targeting appear to have a viable strategy for resolving the impasse. A final issue which urgently demands attention, therefore, is whether there are any plausible prospects for a coherent and principled political compromise over the issue of targeting terrorists.¶ Conclusion: the Possibility of Principled Compromise ¶ This final section offers a brief case that there is room for a principled compromise between critics and advocates of targeting terrorists. The argument is by example—a short illustration of one promising possibility. It will not satisfy everyone, but I suggest that it has the potential to resolve the most compelling concerns on both sides.¶ The most telling issues raised by critics of targeting fall into three categories: (1) the imperative need to establish that targets are combatants; (2) the need in attacking combatants to respect the established laws of war; and (3) the overwhelming imperative to avoid civilian casualties. The first issue seems to demand an authoritative judicial determination that could only be answered by a competent court. The second issue requires the openly avowed and consistent implementation of targeting according to standards accepted in international law—a requirement whose fulfillment would best be assured through judicial oversight. The third issue calls for independent evaluation of operations to assure that standards of civilian protection are robustly upheld, a role that could be effectively performed by a court.

#### Now is key and only the US can lead---lack of rules undermines all other norms on violence

James Whibley 13, received a M.A. in International Relations from Victoria University of Wellington, New Zealand, February 6th, 2013 "The Proliferation of Drone Warfare: The Weakening of Norms and International Precedent," Georgetown Journal of International Affairs,journal.georgetown.edu/2013/02/06/the-proliferation-of-drone-warfare-the-weakening-of-norms-and-international-precedent-by-james-whibley/

While drone advocates such as Max Boot argue that other countries are unlikely to follow any precedents about drone use established by America, power has an undeniable effect in establishing which norms are respected or enforced. America used its power in the international system after World War 2 to embed norms about human rights and liberal political organization, not only in allies, but in former adversaries and the international system as a whole. Likewise, the literature on rule-oriented constructivism presents a powerful case that norms have set precedents on the appropriate war-fighting and deterrence policies when using weapons of mass destruction and the practices of colonialism and human intervention. Therefore, drones advocates must consider the possible **unintended consequences of** lending legitimacy **to the** unrestricted use of drones. However, with the Obama administration only now beginning to formulate rules about using drones and seemingly uninterested in restraining its current practices, the US may miss an opportunity to entrench international norms about drone operations.¶ If countries begin to follow the precedent set by the US, there is also the risk of weakening pre-existing international norms about the use of violence. In the summer 2000 issue of International Security, Ward Thomas warned that, while the long-standing norm against assassination has always been less applicable to terrorist groups, the targeting of terrorists is, “likely to undermine the norm as a whole and erode the barriers to the use of assassination in other circumstances.” Such an occurrence would represent a deleterious unintended consequence to an already inhumane international system, justifying greater scrutiny of the drone program.¶ Realism cautions scholars not to expect ethical behaviour in international politics. Yet, the widespread use of drones by recent administrations with little accountability and the lack of any normative framework about their deployment on the battlefield could come to be seen as a serious strategic error and moral failing. If the Obama administration was nervous about leaving an amorphous drone policy to a possible Romney Presidency, then surely China or Russia possessing such a program would be terrifying.

## 2AC

### T

#### We meet---plan restricts Presidential authority to construe the legal limits on TK---assassination ban proves

Jonathan Ulrich 5, associate in the International Arbitration Group of White & Case, LLP, JD from the University of Virginia School of Law, “NOTE: The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism,” 45 Va. J. Int'l L. 1029, lexis

The discretionary authority to construe the limits of the assassination ban remains in the hands of the president. He holds the power, moreover, to amend or revoke the Executive Order, and may do so without publicly disclosing that he has done so; since the Order addresses intelligence activities, any modifications may be classified information. n24 The placement of the prohibition within an executive order, therefore, effectively "guarantees that the authority to order assassination lies with the president alone." n25 Congress has similar authority to revise or repeal the Order - though its failure to do so, when coupled with the three unsuccessful attempts to legislate a ban, may be read as implicit authority for the president to retain targeted killing as a [\*1035] policy option. n26 Indeed, in recent years, there have been some efforts in Congress to lift the ban entirely. n27

#### Restrictions mean limitations

CAA 8,COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT A, STATE OF ARIZONA, Appellee, v. JEREMY RAY WAGNER, Appellant., 2008 Ariz. App. Unpub. LEXIS 613

P10 The term "restriction" is not defined by the Legislature for the purposes of the DUI statutes. See generally A.R.S. § 28-1301 (2004) (providing the "[d]efinitions" section of the DUI statutes). In the absence of a statutory definition of a term, we look to ordinary dictionary definitions and do not construe the word as being a term of art. Lee v. State, 215 Ariz. 540, 544, ¶ 15, 161 P.3d 583, 587 (App. 2007) ("When a statutory term is not explicitly defined, we assume, unless otherwise stated, that the Legislature intended to accord the word its natural and obvious meaning, which may be discerned from its dictionary definition.").¶ P11 The dictionary definition of "restriction" is "[a] limitation or qualification." Black's Law Dictionary 1341 (8th ed. 1999). In fact, "limited" and "restricted" are considered synonyms. See Webster's II New Collegiate Dictionary 946 (2001). Under these commonly accepted definitions, Wagner's driving privileges were "restrict[ed]" when they were "limited" by the ignition interlock requirement. Wagner was not only [\*7] statutorily required to install an ignition interlock device on all of the vehicles he operated, A.R.S. § 28-1461(A)(1)(b), but he was also prohibited from driving any vehicle that was not equipped with such a device, regardless whether he owned the vehicle or was under the influence of intoxicants, A.R.S. § 28-1464(H). These limitations constituted a restriction on Wagner's privilege to drive, for he was unable to drive in circumstances which were otherwise available to the general driving population. Thus, the rules of statutory construction dictate that the term "restriction" includes the ignition interlock device limitation.

#### We restrict the war power to assert sovereign immunity AND cause of action is a restriction

Edward Keynes 10, Professor of Political Science at The Pennsylvania State University and has been visiting professor at the universities of Cologne, Kiel, and Marburg. A University of Wisconsin Ph.D., he has been a Fulbright and an Alexander von Humboldt fellow, “Undeclared War: Twilight Zone of Constitutional Power”, Google Books, p. 119-120

Despite numerous cases challenging the President’s authority to initiate and conduct the Vietnam War, the Federal courts exhibited extreme caution in entering this twilight zone of constitutional power. The federal judiciary’s reluctance to decide war-powers controversies reveals a respect for the constitutional separation of powers, an appreciation of the respective constitutional functions of Congress and the President in external affairs, and a sense of judicial self-restraint. Although most Federal courts exercised self-restraint, several courts scaled such procedural barriers as jurisdiction, standing to sue, sovereign immunity, and the political question to address the scope of congressional and presidential power to initiate war and military hostilities without a declaration of war. The latter decisions reveal an appreciation of the constitutional equilibrium upon which the separation of powers and the rule of law rest. Despite judicial caution, several Federal courts entered the political thicket in order to restore the constitutional balance between Congress and the President. Toward the end of the war in Indochina, judicial concern for the rule of law recommended intervention rather than self-restraint.

#### So is ex post

ECHR 91,European Court of Human Rights, Decision in Ezelin v. France, 26 April 1991, http://www.bailii.org/eu/cases/ECHR/1991/29.html

The main question in issue concerns Article 11 (art. 11), which provides:¶ "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.¶ 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. ..."¶ Notwithstanding its autonomous role and particular sphere of application, Article 11 (art. 11) must, in the present case, also be considered in the light of Article 10 (art. 10) (see the Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 23, § 57). The protection of personal opinions, secured by Article 10 (art. 10), is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 (art. 11).¶ A. Whether there was an interference with the exercise of the freedom of peaceful assembly¶ In the Government’s submission, Mr Ezelin had not suffered any interference with the exercise of his freedom of peaceful assembly and freedom of expression: he had been able to take part in the procession of 12 February 1983 unhindered and to express his convictions publicly, in his professional capacity and as he wished; he was reprimanded only after the event and on account of personal conduct deemed to be inconsistent with the obligations of his profession.¶ The Court does not accept this submission. The term "restrictions" in paragraph 2 of Article 11 (art. 11-2) - and of Article 10 (art. 10-2) - cannot be interpreted as not including measures - such as punitive measures - taken not before or during but after a meeting (cf. in particular, as regards Article 10 (art. 10), the Handyside judgment of 7 December 1976, Series A no. 24, p. 21, § 43, and the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 19, § 28).

#### Counter-interp---authority means legality---and Vladeck says we clarify permissible scope

Ellen Taylor 96, 21 Del. J. Corp. L. 870 (1996), Hein Online

The term authority is commonly thought of in the context of the law of agency, and the Restatement (Second) of Agency defines both power and authority.'89 Power refers to an agent's ability or capacity to produce a change in a legal relation (whether or not the principal approves of the change), and authority refers to the power given (permission granted) to the agent by the principal to affect the legal relations of the principal; the distinction is between what the agent can do and what the agent may do.

#### Counter-interp---war powers authority is OVERALL power over war-making---we meet

Manget 91 Fred F, Assistant General Counsel with the CIA, "Presidential War Powers", 1991, media.nara.gov/dc-metro/rg-263/6922330/Box-10-114-7/263-a1-27-box-10-114-7.pdf

The President's war powers authority is actually a national defense power that exists at all times, whether or not there is a war declared by Congress, an armed conflict, or any other hostilities or fighting. In a recent case the Supreme Court upheld the revocation of the passport of a former CIA employee (Agee) and rejected his contention that certain statements of Executive Branch policy were entitled to diminished weight because they concerned the powers of the Executive in wartime. The Court stated: "History eloquently attests that grave problems of national security and foreign policy are by no means limited to times of formally declared war. " 3 ; Another court has said that the war power is not confined to actual engagements on fields of battle only but embraces every aspect of national defense and comprehends everything required to wage war successfully. 3 H A third court stated: "It is-and must be-true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means . "39 ¶ Thus, the Executive Branch's constitutional war powers authority does not spring into existence when Congress declares war, nor is it dependent on there being hostilities. It empowers the President to prepare for war as well as wage it, in the broadest sense. It operates at all times.

### CP

#### Congress can’t solve because the courts won’t allow them to regulate the exercise of inherent self-defense authority---only the plan lets the courts restrict the scope of that authority

Geoffrey Corn 10, Associate Professor of Law at South Texas College of Law, formerly the Army’s senior law of war expert in the Office of the Judge Advocate General and Chief of the Law of War Branch in the International Law Division, 4/7/2010, “TRIGGERING CONGRESSIONAL WAR POWERS NOTIFICATION: A PROPOSAL TO RECONCILE CONSTITUTIONAL PRACTICE WITH OPERATIONAL REALITY,” Lewis & Clark Law Review Vol 14:2, http://www.lclark.edu/live/files/4813

Complicating any effort to require the President to interact with Congress on war powers decisions is the almost universally accepted existence of exclusive executive authority to respond to attacks on the United States or its armed forces.73 This authority is derived from the President’s role as both Chief Executive and Commander-in-Chief, and was clearly acknowledged by the Supreme Court in the Civil War decisions, The Prize Cases.74 In those cases, the Court was called upon to decide whether President Lincoln could invoke the jus belli75 as a legal basis to sell captured Confederate shipping vessels as prize.76 This required the Court to determine whether the military response to the southern rebellion was considered a war for legal purposes even though it had not been authorized by Congress. In affirming the legality of the disposition of the captured shipping vessels, the Court ruled that when war is thrust upon the nation, the President had not only the authority but the obligation to “resist force by force.”77 This authority was not dependent upon congressional authorization; instead, it was derived from the inherent Article II power of the President.78 Accordingly, the President was constitutionally authorized to use all the measures permitted by the jus belli.¶ If there was any doubt regarding the constitutional basis for this inherent presidential “defensive” or “responsive” war authority,79 it was dispelled with the enactment of the War Powers Resolution. Even though the Resolution was the product of undoubtedly the most expansive assertion of congressional war powers in the history of the nation, it expressly acknowledged the President’s authority to engage the armed forces for the limited purpose of responding to an attack being “thrust” upon the nation, and even expanded the reach of this authority to include attacks against U.S. armed forces stationed outside the nation. According to the purpose section of the statute: ¶ The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces. 80 ¶ The consequence of this acknowledgment of authority is significant, for it suggests that congressional demands that the President follow certain procedures as a predicate requirement to the exercise of this authority intrudes upon this vested constitutional power. ¶ Any notice or consulting provision must therefore be sufficiently tailored to avoid such intrusion. This is no easy feat. Drawing a line between defensive or responsive, and offensive or non-responsive uses of the armed forces is extremely complicated. This complication is exacerbated by the inevitable blurring of international legal authority to employ military force and domestic constitutional analysis. Because such uses of force implicate not only constitutional authority but also the international law that defines the right of a state to act in self-defense, there is a tendency to use the legal standards from one context as a basis for definition of the other. When this occurs, the jus ad bellum concept of “anticipatory” self-defense makes this line-drawing exponentially more difficult because it suggests that the President is vested with inherent authority not only to respond to attacks “thrust” upon the nation, but also those that are about to be thrust upon the nation.81 As will be discussed in more detail below, this blending of international and constitutional legal standards is both unjustified and detrimental to defining constitutional authorities.

#### Counterplan either links or doesn’t solve because it doesn’t clarify key legal questions

Sarah Knuckey 10-1, is Director of the Project on Extrajudicial Executions at New York University School of Law, and a Special Advisor to the UN Special Rapporteur on extrajudicial executions, October 1st, 2013, "Transparency on Targeted Killings: Promises Made, but Little Progress," justsecurity.org/2013/10/01/transparency-targeted-killings-promises-made-progress/

Some interpreted these efforts and the President’s speech to mark the beginning of improved transparency. But despite transparency promises and expectations, many of the same, core concerns regarding undue secrecy remain. The President’s speech, the Policy Guidance, and Holder’s letter – because of textual ambiguities within each, and combined with events since – have largely failed to address these longstanding concerns, and in some important respects aggravated them.¶ Continuing Secrecy on Core Issues¶ Key areas in which transparency has not yet been forthcoming include: ¶ Who can be killed, where, and on what basis. Demands for legal and policy information on who and when the US believes it can kill have long been at the center of calls for more transparency. Senior US officials, before 2013, delivered important speeches outlining the government’s views on the applicable legal frameworks for targeting. But the speeches lacked detail, and left crucial legal questions unanswered. Legal concepts key to understanding the scope of US targeting – like “imminence,” “associated forces,” and “directly participating in hostilities” – remain unclear (see this and this). The relevant legal memos have still not been published, even in redacted form. In addition, although President Obama’s speech and the published Policy Guidance set out strict rules for the use of force – stricter, in numerous respects, than the laws of war – they are not legally binding, and we do not know when they began to apply, or when the strict policy limits on killing may be relaxed (and if we will ever be told when they are). And, crucially, we don’t know where the new guidelines actually apply (original assumptions by many outside government that they applied in Pakistan were later called into question). Since Obama’s May 2013 speech, confusion about who can be targeted has at times increased (e.g. a “senior American official” stated in August that a security threat had “expanded the scope” of who could be targeted in Yemen).¶ Basic program facts, overall casualties, and statistical strike information. The President admitted in his May speech that some civilian casualties have occurred. But the government refuses to release even basic statistical information about the numbers of strikes or of those killed, or to disclose its own civilian casualty estimates, or strike locations.¶ Specific strikes. The US continues to say nothing at all, officially, about the facts of most strikes. When questioned about specific strikes since May 2013, senior officials have generally continued simply to decline to comment, refusing even to acknowledge whether the US was involved. Given that the US publicly acknowledged in 2012 that it uses force in Yemen, it is not clear why the US continues to refuse to provide details on, at least, Yemen strikes. During the July-August 2013 surge in Yemen strikes, public information (limited as it was) came largely from news reports quoting anonymous US and Yemeni officials. Adding to confusion, the accounts in different outlets at times appeared contradictory (compare NYT, NBC, and ABC). Reports of civilian casualties called into question the government’s “near-certainty” standard, but were left unaddressed by officials. And although President Obama stated that the declassified information in Holder’s letter was to “facilitate transparency,” the letter does not explain why US citizens Samir Khan, Abdulrahman al-Awlaki, and Jude Kenen Mohammed were killed, saying only that they were “not specifically targeted.”¶ Civilian harm – investigations, acknowledgment, redress. There has been no public information on any government efforts this year to acknowledge civilian harm and provide redress. I have previously listed just some of the strikes that raise particular concerns, none of which have been publicly acknowledged by the government; nor have the findings of any government investigations been released. And despite assurances about post-strike investigations, I am not aware of US officials seeking testimony from alleged victims, their lawyers, or from NGOs or journalists who have investigated specific strikes.¶ Transfer to DOD. Despite expectations in May 2013 that Administration efforts to promote transparency would include moving the program from the CIA to DOD, one of the last officials to publicly address this said that it may not happen “for years.”¶ The US government’s public statements and limited disclosures to date have been welcome steps towards transparency. But they fall far short of what is necessary, and important core questions remain unanswered.

#### Won’t trust---perceived as cherry-picking legal rationales---disclosure is NOT transparency without external verification

Jameel Jaffer 10-7, is Deputy Legal Director at the American Civil Liberties Union and Director of the ACLU’s Center for Democracy, October 7th, 2013, "Selective Disclosure About Targeted Killing," justsecurity.org/2013/10/07/selective-disclosure-targeted-killing/

For several years, the ACLU has been pressing the Obama administration to be more transparent about the targeted-killing program. I’m starting to wonder whether it understands what we mean. ¶ Last week, I argued a case before the Second Circuit involving the secrecy surrounding the program. The case involves a Freedom of Information Act request filed by the ACLU two years ago for records about the government’s killing of three Americans in Yemen. The CIA initially claimed it couldn’t disclose whether it had records responsive to the request without compromising national security. Later the CIA acknowledged that it had responsive records but argued that national-security concerns precluded it from enumerating or describing them. Earlier this year, the district court observed that the CIA’s so-called “no-number no-list” response was the stuff of Alice in Wonderland—but then ruled for the CIA anyway.¶ In our appeal brief, we point to the many instances in which senior government officials have discussed the targeted killing program publicly. In media interviews and speeches, we write, officials have defended the program’s legality, effectiveness, and necessity. They’ve dismissed concerns about civilian casualties. And through not-for-attribution interviews with reporters, they’ve engaged in what one appeals-court judge called “a pattern of strategic and selective leaks at the highest level of government.” We argue that the administration shouldn’t be permitted to pretend that everything about the program is a secret while its most senior officials conduct a public-relations campaign about it.¶ At oral argument last week, though, the government’s attorney turned our argument on its head. The disclosures cited by the ACLU, she said, were evidence that the government had made a genuine effort to be transparent about the targeted-killing program. By pointing to those disclosures, she said, the ACLU was trying to penalize the government for having been as transparent as it had been. (I’m paraphrasing because I don’t yet have the transcript.) The government’s attorney also warned the court against requiring the government to disclose more. If the court held that the government couldn’t disclose some information about a subject without waiving its right to withhold other information, she argued, the government would hesitate before releasing anything at all.¶ The government fundamentally misunderstands our complaint—or it understands only half of it. Our complaint isn’t just that government officials are keeping too much information secret, though they are. It’s also that the government is releasing information selectively—that it’s cherry-picking its disclosures in a way that misleads the public about the targeted-killing program’s scope and nature and implications. Government officials release information about the killing of suspected terrorists but withhold information about bystander casualties. They tell the public that lethal force is used only when capture is infeasible, but they decline to say how feasibility is assessed. They release a Cliffs Notes version of their legal theory, but not the legal memos—let alone the factual ones—on the basis of which the killings actually take place. They release facts meant to reassure, but they withhold facts that might unsettle.¶ Of course there’s nothing new about this kind of thing. Governments prefer to release information that presents their actions in a flattering light and suppress information that doesn’t. But this is why we have the FOIA. The Obama administration suggests that the FOIA is concerned only with excessive secrecy, but while the Congress that enacted the statute in 1966 was concerned with “transparency” in the narrow sense of that word, it was at least as troubled by selective disclosure. Here is the House Republican Policy Committee’s statement in support of the Act:¶ In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear. High officials have warned that our Government is in grave danger of losing the public’s confidence both at home and abroad. The credibility gap that has affected the Administration’s pronouncements on domestic affairs and Vietnam has spread to other parts of the world. The on-again, off-again, obviously less-than-truthful manner in which the reduction of American forces in Europe has been handled has made this country the subject of ridicule and jokes. “Would you believe?” has now become more than a clever saying. It is a legitimate inquiry.¶ Americans have always taken great pride in their individual and national credibility. We have recognized that men and nations can be no better than their word. This legislation will help to blaze a trail of truthfulness and accurate disclosure in what has become a jungle of falsification, unjustified secrecy, and misstatement by statistic.¶ Representative Donald Rumsfeld of Illinois, a champion of the proposed law, set expectations slightly lower but explained the law’s aims similarly:¶ Certainly it has been the nature of Government to play down mistakes and to promote successes. This has been the case in past administrations. Very likely this will be true in the future. . . . [This bill] will not change this phenomenon. Rather, the bill will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government or how an individual Government official is handling his job.¶ (Citations and a fuller discussion of the legislative history can be found at pages 17-19 of this brief.)¶ The point is obvious: disclosure and transparency can be two very different things. If the government discloses that it doesn’t engage in “torture” but suppresses the memos that redefine the term, the disclosure hasn’t served transparency but undermined it. The same is true if the government discloses (or celebrates) the killing of “militants” but refuses to release information about the killing of innocent bystanders. Perhaps these disclosures shouldn’t be thought of as disclosures at all. If they’re disclosures, they’re disclosures that misinform or mislead rather than enlighten.

#### Transparency without reform doesn’t solve precedent---investigating wrongful deaths is key

Naureen Shah 13, August 17th, 2013, "Obama has not delivered on May's promise of transparency on drones," The Guardian, www.theguardian.com/commentisfree/2013/aug/17/obama-promise-transparency-drone-killing

Even more damning is that, in the absence of any commitment to investigating credible allegations of unlawful deaths, the United States appears indifferent to the question of who is actually dying in drone strikes. President Obama admitted in May that four US citizens had been killed, three of whom – including 16-year-old Abdulrahman Aal-Awlaki – he admitted were not intended targets. But the president did not define the identities of the more than 4,000 other people killed, or specifically address reports that a significant number of the dead – in assessments varying between 400 and nearly 1,000, according to the Bureau of Investigative Journalism – were civilians.¶ When the president acknowledges four deaths of US citizens, but not 4,000 deaths of non-Americans, he signals to the world a callous and discriminatory disregard for human life. Perhaps only a fraction of these 4,000 deaths were unlawful. But acknowledging and investigating these deaths is a matter of dignity and justice – for the survivors of strikes, their communities and their countrymen.¶ When deaths are found to be unlawful, victims' families and survivors have a right to reparation. Refusing to investigate deaths is a matter of disrespect both for international law and for the public's right to know the full truth.¶ Many critics, before President Obama's May address, feared that foreign governments would follow the US to lead and conduct secret drone strikes without regard for international law. They should still be concerned about the precedent the US government is setting: refusing to investigate or be held accountable for wrongful deaths.¶ The risk now is not just that the late May reforms on drone strikes were half-measures, but that they were calibrated to merely reassure the public, defuse criticism, and avert longer, harder scrutiny of whether the government's actions are lawful and right. A token dose of transparency may remove the sting of government secrecy, but it does not cure the disease.

#### Other countries won’t believe us---external verification key

Philip Alston 11, John Norton Pomeroy Professor of Law at the NYU School of Law, former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, “The CIA and Targeted Killings Beyond Borders,” 2011, 2 Harv. Nat'l Sec. J. 283, lexis

Before moving to consider the Obama administration's approach to these issues, it is important to underscore the fact that we are talking about two different levels of accountability. The first is that national procedures must meet certain standards of transparency and accountability in order to meet existing international obligations. The second is that the national procedures must themselves be sufficiently transparent to international bodies as to permit the latter to make their own assessment of the extent to which the state concerned is in compliance with its obligations. In other words, even in situations in which states argue that they put in place highly impartial and reliable accountability mechanisms, the international community cannot be expected to take such assurances on the basis of faith rather than of convincing information. Assurances offered by other states accused of transgressing international standards would not be accepted by the United States in the absence of sufficient information upon the basis of which some form of verification is feasible. Since the 1980s, the phrase "trust but verify" n104 has been something of a mantra in the arms control field, but it is equally applicable in relation to IHL and IHRL. The United States has consistently demanded of other states that they demonstrate to the international community the extent of their compliance with international standards. A great many examples could be cited, not only from the annual State Department reports on the human rights practices of other states, but also from a range of statements by the President and the Secretary of State in relation to countries like Egypt, Libya, and Syria in the context of the Arab Spring of 2011.

### AT: ATS DA

#### Bates concludes the Court ­­WOULDN’T rule on the grounds their DA is about --- read blue

Bates, 10 (John, United States District Judge for the US District Court for the District of Columbia, DC Circuit Court Decision, Civil Acton No. 10-1496, “Nasser Al-Aulaqui Vs Barack H. Obama et al: Memorandum Opinion”, <http://www.aclu.org/files/assets/2010-12-7-AulaqivObama-Decision.pdf>)

Plaintiff maintains that his alleged tort -- extrajudicial killing - - meets the high bar of Sosa, since there is a customary international law norm against state-sponsored extrajudicial killings, which has been "consistently recognized by U.S. courts" and " indeed codified in domestic law under the Torture Victim Protection Act." See Pl.'s Opp. a t 39. Plaintiff is 1 0 correct insofar as many U.S. courts have recognized a customary international law norm against past state-sponsored extrajudicial killings as the basis for an ATS claim. See, e.g ., Wiwa, 626 F Supp. 2d at 383 n.4; Mujica, 381 F . Supp. 2d at 1178-79; Kadic, 70 F .3d at 241-45; Forti v. Suarez-Mason, 672 F . Supp. 1531, 1542 (N.D. Cal. 1987), recons. granted in part on other grounds , 694 F. Supp. 707 (N.D . Cal. 1988). Significantly, however, plaintiff cites no case in which a court has ever recognized a "customary international law norm" against a threatened future extrajudicial killing, nor does he cite a sing lease in which a n alien has ever been permitted to rec over under the ATS for the extrajudicial killing of his U.S. citizen child. These two features of plaintiff's ATS claim -- that it is based on a threat of a future extrajudicial killing, not an actual extrajudicial killing , that is directed not to plaintiff or to his alien relative, but to his U.S. citizen son -- render plaintiff' s ATS claim fundamentally distinct from all extrajudicial killing claims that courts have previously held cognizable under the A TS. Even assuming that the threat at issue were directed to plaintiff (rather than to plaintiff' s U.S. citizen son), there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing -- as opposed to the commission of a past state- sponsored extrajudicial killing -- constitutes a tort in violation of the " law of nations." A threatened extrajudicial killing could possibly -- de pending on the precise nature of the threat -- for m the basis of a state tort law claim for assault, see R E S T . (S E C O N D ) O F T O R T S § 21 (1965) (explaining that an actor is subject to liability for assault if he acts "with the intent to cause a harmful or offensive contact, or a n imminent apprehension of such a contact," and the other person " is thereby put in such imminent apprehension" ), or f or intentional infliction of emotional distress, see id. § 46( 1) (stating that "[o]ne who by extreme and outrageous conduct intentionally or recklessly cause s sever e emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm" ). But common law tort claims for assault and intentional infliction of emotional distress do not rise to the level of inter national torts that are "sufficiently definite and accepted ' among civilized nations' to qualify for the A TS jurisdictional g rant." See Ali Shafi, 686 F . Supp. 2d at 29 (quoting Sosa, 542 U.S. at 732) . Plaintiff cites no treaty or international document that recognizes assault or intentional infliction of emotional distress as a violation of the "present-day law of nations," nor doe she cite any case in which a court ha s ever found such common law torts cognizable under the A TS. Indeed, there appear s to be only one case in which a court ha s even considered whether "fear " and "anguish" could form the basis of a n ATS claim. See Mujica, 381 F . Supp. 2d at 1183. There , the court expressly rejected the plaintiffs' contention that psychic, e motional harms were sufficient to state a claim under the ATS. As that court explained, " [i ]t would be impractical to recognize these allegations as constituting a n ATS claim because it would allow foreign plaintiffs to litigate claims in U.S. courts that bear a strong resemblance to intentional infliction of emotional distress." I d. Such a holding, the court noted, would make "broad swaths of conduct" actionable by aliens under the ATS, id., which is precisely what the Supreme Court in Sosa warned against. I n Sosa, the Supreme Court instructed federal courts to exercise " great caution" in recognizing new causes of action under the ATS as violations of the " present-day law of nations," and urged courts to consider " the practical consequences" of making such causes of action available to litigants worldwide . See Sosa, 542 U.S. at 728, 732-33. I f this Court were to conclude that alleged government threats -- no matter how plausible or severe the y may be -- constitute international torts committed in violation of the law of nations, federal courts could be flooded with ATS suits from persons a cross the g lobe who alleged that they were somehow place d in fear of danger as a result of contemplated government action. Surely, as interpreted in Sosa, the ATS was not intended to provide a federal forum for such speculative claims.

#### The UN is structurally inept --- can’t solve anything

Lindsay and Daalder, 7 (James Lindsay, Director, Robert S. Strauss Center for International Security and Law @ Brookings, and Ivo Daalder, senior fellow at Foreign Policy, “Democracies of the World, Unite,” Jan/Feb, The American Interest, http://www.the-american-interest.com/article.cfm?piece=220)

Yet for all its basic logic and appeal, a great power concert is not sufficient. One obvious problem is that great powers often refuse to cooperate. Washington may think Beijing should use its economic clout to shut down Pyongyang’s nuclear weapons program, or that Moscow should halt its nuclear dealings with Tehran, but China and Russia see their interests differently, the former even after the North Korean nuclear test of this past October. Moreover, disagreements among the great powers are the sharpest on perhaps the defining issue of our day: the extent to which sovereignty should remain inviolable. Russia and especially China have become the foremost defenders of the principle that states are the exclusive masters of their own internal affairs. They have resisted—from Kosovo to Darfur to Burma—every action proposed by the United States and the European Union that would interfere in the domestic circumstances of other states.¶ A concert-of-powers strategy suffers from a second fundamental weakness: a lack of legitimacy. By definition, the vast majority of states and people would have no role in setting the rules. One reason Hugo Chavez and Mahmoud Ahmadinejad receive such rousing receptions when they rail against great-power dominance from the rostrums of the UN General Assembly is that many of their listeners resent being told what to do by a few powerful countries. Might, they contend, doesn’t make right, so few of these countries see any reason to abide by the rules or wishes of the powerful.¶ The lack of legitimacy in great-power concerts is why so many states favor larger, universalist organizations like the United Nations as the primary vehicle for international cooperation. In some instances, these organizations do a creditable job. This is especially true of some of the UN’s functional agencies, like the UNHCR, the World Food Programme and the World Health Organization. Confronted with a particular task—resettling refugees, feeding the hungry, eradicating diseases—these UN bodies often do a remarkably effective job even when, as is invariably the case, their resources prove inadequate to the task.¶ But in many instances, and especially in hardcore security questions, the United Nations falls far short. The UN must have consensus to act, but consensus is usually difficult to achieve. When it finally achieves agreement, its actions are often delayed or deficient. The UN Security Council proved unable to achieve a consensus on how to address Iraq’s failure to comply with its many resolutions, leaving it sidelined when the United States, the United Kingdom and a few other countries decided to take matters into their own hands. North Korea has repeatedly violated its nuclear non-proliferation commitments; the response from Turtle Bay so far has been weak and indecisive. Genocide in Darfur has prompted heated speeches in the General Assembly, but little in the way of effective action.¶ None of this is terribly surprising. The United Nations was founded in a different era and for different purposes. The goal in 1945 was to avoid another great war like the one just concluded. The victorious powers believed they could prevent war as long as they were united in that common purpose. This belief proved to be well-founded, but only when it came to war among great powers themselves. Violent conflict among lesser powers and between greater and lesser powers hardly disappeared after the UN’s founding. On the contrary, as the number of nominally sovereign states multiplied, so did the incidence of conflict both within and between them. And though the United Nations at times succeeded in mitigating the consequences or mediating the end of these wars, in the vast majority of instances it stood by helplessly as deadly conflicts unfolded. In a few conflicts, it can be argued, a feckless UN peacekeeping presence actually, if inadvertently, facilitated violence and massive human rights violations—as in Bosnia-Herzegovina.¶ One reason the UN falls short of the hopes its supporters have for it is that the Security Council institutionalizes the deficiencies of a great-power concert more readily than its benefits. Unless the five permanent members agree to act, the Security Council will at most talk an issue to death.¶ Another reason for the UN’s failings lies in what is held to be the UN’s great virtue—its universality. Even as many see the UN’s universality as the source of its legitimacy, it is in many ways the UN’s greatest curse. It makes the institution beholden to its least cooperative members—a point underscored by the repeated failures to reform the organization. Universality also focuses almost all of the UN’s attention and action on the relationship between and among states rather than on what happens within them. And therein lies the rub. In our increasingly interconnected world the main threats to security stem from developments within states rather than from their external behavior. Yet the UN’s founding Charter insists that a state’s domestic affairs remain essentially outside the purview of others.¶ Although the vast majority of UN members is comfortable with the notion that borders demarcate international no-go zones, this principle of absolute sovereignty is unsustainable in an age of global politics. When developments within one state can profoundly affect the security and well-being of peoples in other states, the only practical way for countries to ensure their security is to interfere into the internal affairs of other states. The fundamental question of how that can best be done is one that the United Nations has so far largely shunned, and that, given its origins and very nature, it is unlikely ever to answer effectively.

#### No will or capability for effective cooperation

Hellmann, 13 (Gunther Hellmann is a senior fellow at the Transatlantic Academy, an initiative of the German Marshall Fund, “The Decline of Multilateralism,” May 2, German Marshall Fund Blog, http://blog.gmfus.org/2013/05/02/the-decline-of-multilateralism/)

WASHINGTON—It is becoming increasingly difficult to argue against retrenchment in Europe and North America. Economic crises and domestic political stagnation absorb energy and consume financial resources. Global military engagements in faraway places cost lives and treasure and often yield limited success. There is growing disillusionment with democracy promotion. Coalitions of sovereign state defenders like the BRICS (Brazil, Russia, India, China, and South Africa) make life for the guardians of the liberal world order ever more challenging. The upshot is multilateral fatigue in both Europe and North America.¶ This is a perilous state of affairs because state-transcending global problems are proliferating. “Global Trends 2030,” a study published by the U.S. National Intelligence Council last December, predicts that “the current, largely Western dominance of global structures … will have been transformed by 2030 to be more in line with the changing hierarchy of new economic players.” Yet even if this were to happen, the report argues, it remains unclear to what degree new or reformed institutions “will have tackled growing global challenges.”¶ One might be forgiven for taking this to be an overly optimistic projection. Based on current trends, the outlook is much gloomier, due mainly to the political contagion effects of sovereigntism, the fixation on state sovereignty as an absolute value, and minilateralism. Moisés Naím, who initially coined the term, defined minilateralism as getting together the “smallest possible number of countries needed to have the largest possible impact on solving a particular problem.” The problem is that the smallest possible number may quickly grow very large; Naím’s own book, The End of Power, provides ample evidence that this is so. Consider, for instance, the number and political weight of countries needed to address the problems in the aftermath of a military escalation in the Middle East and Persian Gulf. The minimum number of countries required to effectively regulate global warming does not look any more encouraging. In other words, sovereigntism and minilateralism are symptoms of the crisis of liberal world order — manifestations of The Democratic Disconnect — and not a recipe for curing its ills.¶ In the old days when multilateralism was not yet qualified politically with such adjectives as “assertive” (Madeleine Albright) or “effective” (EU), it served as a descriptor for a fundamental transformation of interstate collaboration in the second half of the 20th century. In an influential article, John Ruggie, a Harvard professor and former high-ranking UN official, showed that the actual practice of multilateralism by the liberal democracies of North America and Europe after World War II was based on a set of generalized principles of conduct. These principles rendered segments of the post-war international order into more reliable cooperative settings, such as the United Nations, or islands of peaceful change, such as the zone of European integration. A readiness to give up sovereignty or, at least to cooperate on the basis of reciprocity, were characteristic elements of multilateralism and what came to be called the “liberal world order.”¶ This liberal order is under strain today because its creators and guardians have themselves strayed from these principles. In the security field, “coalitions of the willing” have undermined multilateralism not only in the UN context, but also in NATO. In economic and financial matters, the politics of European sovereign debt crisis management illustrates both the dangers of executive federalism and the limits of diffuse reciprocity among Europe’s nation states in the world’s most integrated region. “Responsible stakeholders,” the former Deputy Secretary of State Robert Zoellick once said, do more than merely “conduct diplomacy to promote their national interests…They recognize that the international system sustains their peaceful prosperity, so they work to sustain that system.” What was meant as advice to China when Zoellick gave that speech in 2005 can easily be redirected at the liberal democracies of North America and Europe today.¶ There are no easy ways out. Even if the slide toward retrenchment can be stopped, the prospects do not seem bright for the kind of bold new initiatives for global institutional reform that are required. It is debatable whether calls for “democratic internationalism” or a new alignment among “like-minded democracies” can do the trick, but Europe and North America need to realize that their stakes in the liberal order are much higher than those of relative newcomers. Indeed, overcoming crises at home hinges at least in part on sustaining a conducive global environment. Readjusting the balance between minilateralism and multilateralism will help.

#### Demonstrating legality is key to avoid foreign lawsuits

Philip Alston 11, John Norton Pomeroy Professor of Law at the NYU School of Law, former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, “The CIA and Targeted Killings Beyond Borders,” 2011, 2 Harv. Nat'l Sec. J. 283, lexis

A more pragmatic reason is that judicial action against CIA personnel is certain to increase in the years ahead as the agency becomes more actively engaged at an operational level in targeted killings. The United States would be better placed to counter such actions if it could demonstrate that it is acting in compliance with the applicable international law.¶ Recent years have seen high-profile prosecutions in several countries in which the CIA has been operating. As noted above, Raymond Davis, a CIA official widely reported to have been involved in drone-based targeted killing operations, was accused in 2011 of two murders in Lahore. The United States indicated that diplomatic and other relations between the two countries would suffer greatly unless he was released. Although the local court system had insisted on proceeding to trial, blood money (diyya) was paid to the families of the two deceased and the case was closed, amid [\*440] allegations of coercion and bribery. n599 In 2007 courts in both Germany and Italy opened prosecutions against CIA agents. In Italy, an Egyptian cleric named Abu Omar was kidnapped on the streets of Milan, rendered to Egypt, and tortured and interrogated. Italian prosecutors charged 22 CIA officials. n600 In Germany, a Lebanese-born German national named Khaled el-Masri was seized in Macedonia and rendered to a CIA prison in Afghanistan where he was interrogated and tortured. Prosecutors issued arrest warrants for 13 CIA officers alleged to have been responsible. In both the German and Italian cases, United States diplomatic cables reveal strong and determined high-level lobbying by U.S. officials who warned their counterparts of extremely serious repercussions if the prosecutions went forward. In the German case, they were abandoned, n601 and in the Italian case the courts went ahead and convicted the CIA officers in absentia, but the Italian Government, responding to representations by the U.S. Secretary of Defense to the Italian Prime Minister, refrained from taking the steps necessary to pursue the convictions internationally. n602

#### Suits don’t hurt military effectiveness

Steve Vladeck 7/25/12, professor of law and the associate dean for scholarship at American University Washington College of Law, “Bivens and/as Immunity: Richard Klingler Responds on Al-Aulaqi–and I Reply,” www.lawfareblog.com/2012/07/bivens-andas-immunity-richard-klingler-responds-on-al-aulaqi-and-i-reply/

Richard thinks that this understanding makes me naive. But a closer reading of both my original post and the forthcoming article by Carlos Vazquez and me to which it linked should make abundantly clear that I take these concerns very seriously–I just think they come into play in other places. Qualified immunity, for example, allows government officers to move to terminate suits like Aulaqi long before any discovery takes place, and the denial thereof is immediately appealable (case in point: Padilla v. Yoo). So in a case in which the defendant’s conduct did not violate “clearly established” law, the concerns Richard articulated will quickly and readily be disposed of at the motion-to-dismiss stage even with recognition of a Bivens cause of action, with minimal intrusion into sensitive military affairs. The same can be said for the amorphous separation-of-powers concerns Richard identified (which are usually handled through either qualified immunity or, in appropriate cases, the political question doctrine), and the state secrets privilege (and “potentially adverse security consequences”). Indeed, what’s wholly missing from Richard’s critique (and all of these lower-court opinions) is any explanation for why these other doctrines don’t adequately account for the government’s (and government officer’s) interests on a case-specific basis. If such arguments are out there, I’m all ears…

#### UN investigation will totally collapse our drone program unless we increase accountability

Allison Frankel 13, staffwriter for the ACLU, January 24th, 2013, “U.N. Human Rights Expert to Investigate U.S. Targeted Killing Program” https://www.aclu.org/blog/national-security/un-human-rights-expert-investigate-us-targeted-killing-program

The U.S. government’s targeted killing policy and its use of drones for killing will be the subject of an investigation by the United Nations, it was announced today. The U.N. Special Rapporteur on counterterrorism and human rights, Ben Emmerson, announced today that he will carry out an inquiry into the civilian impact and human rights implications of targeted killing. In a press conference held in London, Mr. Emmerson stated that under international law, nations have an obligation to “establish effective independent and impartial investigations into any drone attack in which it is plausibly alleged that civilian casualties were sustained,” and if such investigations are not conducted, the U.N. may need to step in and investigate individual drone strikes. The inquiry marks an important step towards ensuring that U.S. policies and practices respect human rights. Thousands of people have been killed by U.S. drone strikes (conducted by the CIA and the military) as part of a secret targeted killing program that began in 2002 and has expanded dramatically under the Obama administration. Part of the problem with the targeted killing program is the government's vague and shifting legal standards, along with lack of accountability and oversight to ensure that killings are not carried out in violation of the Constitution and international law. Hina Shamsi, director of the American Civil Liberties Union’s National Security Project, welcomed the inquiry “in the hopes that global pressure will bring the U.S. back into line with international law requirements that strictly limit the use of lethal force.” As Shamsi said, “Virtually no other country agrees with the U.S.’s claimed authority to secretly declare people enemies of the state and kill them and civilian bystanders far from any recognized battlefield. To date, there has been an abysmal lack of transparency and no accountability for the U.S. government’s ever-expanding targeted killing program.”

#### No deference now and courts are increasing restrictions

Andrew Kent 10-8, Faculty Advisor of the Center on National Security at

Fordham Law School, professor at Fordham University School of Law, constitutional law, foreign relations law, national security law, federal courts and procedure, October 8th, 2013, “ARE DAMAGES DIFFERENT?: BIVENS AND NATIONAL SECURITY,” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2330476

But the refusal to allow Bivens damages remedies in these national security cases is exceptional in another sense: the Supreme Co urt has never been more assertive in adjudicating national security and foreign relations issues than it has in recent years. The last decade saw the executive lose (or have its legal arguments offered as amicus curiae rejected) time after time in Supreme Court cases concerning questions of judicial power and justiciability in foreign relations and national security.11 In the most high profile of these cases, the ones concerning the post-9/11 war on terror, the Court emphatically asserted its authority and rejected or ignored the notion that deference to the executive was appropriate because of the national security or foreign affairs dimensions of the disputes.12 In these war-on-terror cases as well as in other national security or foreign relations contexts, the Supreme Court has ruled repeatedly against the executive and, in so doing, approved judicial review of the executive’s national security actions, in suits where plaintiffs sought prospective, injunctive-type remedies against the government.13 Remedies of that type are typically thought to involve much more judicial intrusion into executive functioning than would a retrospective award of money damages,14 and in some instances injunctive-type remedies were implied by the courts from a jurisdictional statute or said to be required by the Constitution itself, rather than being expressly created by Congress. In addition, the war-on-terror decisions in Rasul, Hamdi, Hamdan and Boumediene were intended by the Court to have, and did in fact have, enormously significant practical effects—restructuring the worldwide interrogation, detention and military commission policies of the executive branch.15 The many critics who think the judiciary has not done enough to remedy perceived excesses in the war-on-terror are missing the larger picture of unprecedented judicial assertiveness and effectiveness.16

## AT: CT DA

#### Plan solves kick-out

Micah Zenko 13, CFR Douglas Dillon Fellow in the Center for Preventive Action, PhD in Political Science from Brandeis University, “Reforming U.S. Drone Strike Policies,” CFR Special Report 65, January 2013

The choice the United States faces is not between unfettered drone use and sacrificing freedom of action, but between drone policy reforms by design or drone policy reforms by default. Recent history demonstrates that domestic political pressure could severely limit drone strikes in ways that the CIA or JSOC have not anticipated. In support of its counterterrorism strategy, the Bush administration engaged in the extraordinary rendition of terrorist suspects to third countries, the use of enhanced interrogation techniques, and warrantless wiretapping. Although the Bush administration defended its policies as critical to protecting the U.S. homeland against terrorist attacks, unprecedented domestic political pressure led to significant reforms or termination. Compared to Bush-era counterterrorism policies, drone strikes are vulnerable to similar—albeit still largely untapped—moral outrage, and they are even more susceptible to political constraints because they occur in plain sight. Indeed, a negative trend in U.S. public opinion on drones is already apparent. Between February and June 2012, U.S. support for drone strikes against suspected terrorists fell from 83 percent to 62 percent—which represents less U.S. support than enhanced interrogation techniques maintained in the mid-2000s.65 Finally, U.S. drone strikes are also widely opposed by the citizens of important allies, emerging powers, and the local populations in states where strikes occur.66 States polled reveal overwhelming opposition to U.S. drone strikes: Greece (90 percent), Egypt (89 percent), Turkey (81 percent), Spain (76 percent), Brazil (76 percent), Japan (75 percent), and Pakistan (83 percent).67 ¶ This is significant because the United States cannot conduct drone strikes in the most critical corners of the world by itself. Drone strikes require the tacit or overt support of host states or neighbors. If such states decided not to cooperate—or to actively resist—U.S. drone strikes, their effectiveness would be immediately and sharply reduced, and the likelihood of civilian casualties would increase. This danger is not hypothetical. In 2007, the Ethiopian government terminated its U.S. military presence after public revelations that U.S. AC-130 gunships were launching attacks from Ethiopia into Somalia. Similarly, in late 2011, Pakistan evicted all U.S. military and intelligence drones, forcing the United States to completely rely on Afghanistan to serve as a staging ground for drone strikes in Pakistan. The United States could attempt to lessen the need for tacit host-state support by making significant investments in armed drones that can be flown off U.S. Navy ships, conducting electronic warfare or missile attacks on air defenses, allowing downed drones to not be recovered and potentially transferred to China or Russia, and losing access to the human intelligence networks on the ground that are critical for identifying targets.¶ According to U.S. diplomats and military officials, active resistance— such as the Pakistani army shooting down U.S. armed drones— is a legitimate concern. In this case, the United States would need to either end drone sorties or escalate U.S. military involvement by attacking Pakistani radar and antiaircraft sites, thus increasing the likelihood of civilian casualties.68 Beyond where drone strikes currently take place, political pressure could severely limit options for new U.S. drone bases. For example, the Obama administration is debating deploying armed drones to attack al-Qaeda in the Islamic Maghreb (AQIM) in North Africa, which would likely require access to a new airbase in the region. To some extent, anger at U.S. sovereignty violations is an inevitable and necessary trade-off when conducting drone strikes. Nevertheless, in each of these cases, domestic anger would partially or fully abate if the United States modified its drone policy in the ways suggested below.

#### Zero chance the plan results in stringent restrictions or a ban on TKs---there’s total consensus among the three branches that the AUMF authorizes broad TK powers, without limitations on geography or associated forces

Benjamin Wittes 13, Senior Fellow in Governance Studies at the Brookings Institution, 2/27/13, “In Defense of the Administration on Targeted Killing of Americans,” http://www.lawfareblog.com/2013/02/in-defense-of-the-administration-on-targeted-killing-of-americans/

This view has currency among European allies, among advocacy groups, and in the legal academy. Unfortunately for its proponents, it has no currency among the three branches of government of the United States. The courts and the executive branch have both taken the opposite view, and the Congress passed a broad authorization for the use of force and despite many opportunities, has never revisited that document to impose limitations by geography or to preclude force on the basis of co-belligerency—much less to clarify that the AUMF does not, any longer, authorize the use of military force at all. Congress has been repeatedly briefed on U.S. targeting decisions, including those involving U.S. persons.[5] It was therefore surely empowered to either use the power of the purse to prohibit such action or to modify the AUMF in a way that undermined the President’s legal reasoning. Not only has it taken neither of these steps, but Congress has also funded the relevant programs. Moreover, as I noted above, Congress’s recent reaffirmation of the AUMF in the 2012 NDAA with respect to detention, once again contains no geographical limitation.

There is, in other words, a consensus among the branches of government on the point that the United States is engaged in an armed conflict

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that involves co-belligerent forces and follows the enemy to the new territorial ground it stakes out. It is a consensus that rejects the particular view of the law advanced by numerous critics. And it is a consensus on which the executive branch is entitled to rely in formulating its legal views.

#### Prefer empirics over theory

Ahmad El-Buckley 13, Egyptian diplomat; citing studies by Mohammed Hafez, Associate Professor in the Department of National Security Affairs at the Naval Postgraduate School, Ph.D. in IR from the London School of Economics and Political Science, and Jenna Jordan, Assistant Professor of International Affairs at Georgia Tech and PhD in Poli Sci from the University of Chicago; “Preserving the Pied Piper: The Importance of Leadership in Deradicalisation,” The Polish Quarterly of International Affairs 22.1 (2013): 98-105, ProQuest

This article argues that while proponents of decapitation and targeted killings of terrorist leaders advance logically sound arguments, empirical studies have often shown that these arguments do not take hold in reality. The article then draws on the Egyptian experience with the deradicalisation of Islamist militant groups to claim that capturing rather than eliminating certain types of leaders can have a substantial impact on efforts to reform weakly committed foot-soldiers of terrorist organisations and non-violent sympathisers, which should be at the heart of all long-term counter-terrorism strategies. The potential of leaders to become heralds of disengagement and deradicalisation must be considered before sending out the order for liquidation.¶ Testing Hypotheses on Decapitation¶ One of the simplest definitions of targeted killings is that they are acts that involve "the intentional slaying of a specific individual or group of individuals ... with explicit governmental approval."1The proponents of this measure as a tool of counter-terrorism will often argue their utility in decreasing the potency of a terrorist organisation by ridding it of its able leaders, thus throwing it into a frenzy of disorder and inefficacy. Successful targeted killings will also, according to its backers, decrease the morale of the organisation, which will subsequently help it wither away, or at least make leadership positions less appealing to likely candidates.2¶ While these arguments appear logical, they have often been disproved by empirical studies that aimed to assess the effects of targeted killings on the viability of the targeted organisation. For example, Hafez and Hatfield studied the effect of Israeli targeted assassinations of Palestinian leaders during the second Intifada and showed that they had no significant impact on reducing attacks against Israeli targets, and thus had no discernible effect on deterring or even disrupting belligerent Palestinian organisations.3 Similar findings were reiterated by Jenna Jordan's seminal study on the subject, which utilised aggregate data from a little less than 300 incidents of targeted killings and leadership capture during a time period of 60 years.4 Perhaps one of Jordan's most pressing findings, and one that is highly relevant to the context of modern contemporary counter-terrorism efforts, is the low utility of targeted killings when applied against religious groups, to the extent that they might even be counterproductive, hardening the organisation and lengthening the conflict.

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### Case

#### Yemen O/W Pakistan and recruitment from drones key

John Masters 8/22/13, Deputy Editor @ the Council on Foreign Relations, “Al-Qaeda in the Arabian Peninsula (AQAP),” CFR Backgrounder, http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369#p6

The militant Islamist group al-Qaeda in the Arabian Peninsula (AQAP) was formed in January 2009 through a union of the Saudi and Yemeni branches of al-Qaeda. Jihadist antecedents in the region date to the early 1990s, when thousands of mujahedeen returned to Yemen after fighting the Soviet occupation in Afghanistan. Analysts rate the Yemen-based group as the most lethal Qaeda franchise, carrying out a domestic insurgency while maintaining its sights on striking Western targets. As the ranks of so-called "al-Qaeda central" in Pakistan have thinned, the umbrella organization's core may shift to Yemen. In August 2013, indications of an AQAP-sponsored plot led to the closure of more than two dozen U.S. diplomatic facilities across the Middle East, Africa, and South Asia.¶ Yemen, long a fractured and fragile country, is increasingly so since the ouster of President Ali Abdullah Saleh in February 2012. AQAP has exploited the instability, establishing a domestic insurgency based in the south. Meanwhile, the United States has expanded counterterrorism operations—particularly drone strikes—in the area. Experts question whether President Abd Rabbu Mansour Hadi's transitional government can pull back the impoverished country from the brink of failure.¶ Members of Ansar al-ShariaMembers of Ansar al-Sharia are seen near a tank taken from the army, as they guard a road leading to the southern Yemeni town of Jaar (Courtesy Reuters).¶ A Legacy of Jihad¶ In the late 1980s, the Saleh regime fostered jihad in what was then North Yemen by repatriating thousands of Yemeni nationals who had fought the Soviets in Afghanistan. Saleh dispatched these mujahadeen to fight the Soviet-backed Marxist government of South Yemen in a successful bid for unification, and subsequently, to crush southern secessionists.¶ The returning Yemenis were joined by other Arab veterans of the Afghan war, foremost among them Osama bin Laden, who advocated a central role for Yemen in global jihad. A corps of jihadists who had trained under bin Laden in Afghanistan formed the militant group Islamic Jihad in Yemen (1990-1994), one of several AQAP predecessors. Other such groups include the Army of Aden Abyan (1994-1998) and al-Qaeda in Yemen, or AQY (1998-2003).¶ In October 2000, a skiff piloted by two members of AQY detonated several hundred pounds of explosives into the hull of the USS Cole, which was moored in the port of Aden. Seventeen U.S. servicemen were killed. Two years later, another suicide bombing orchestrated by AQY, on the French oil tanker M/V Limburg, killed one crew member and further highlighted the threat to Western interests in the region. Several militants involved in the Limburg plot would eventually hold top leadership positions in AQAP.¶ Following the Cole bombing and the al-Qaeda-led attacks on September 11, 2001, the Bush administration pressed the Saleh government to begin aggressive counterterrorism operations against AQY. Many analysts believe Saleh may have stoked the jihadist threat—perhaps facilitating prison escapes of convicted terrorists—to ensure Western backing for his embattled regime, which viewed northern insurgents and southern secessionists as a greater threat than al-Qaeda.¶ Washington dispatched Special Forces and intelligence personnel to Yemen to aid the counterterrorism campaign. A U.S. drone strike in 2002, the first such operation in the region, killed AQY's leader, Abu Ali al-Harithi. By the end of 2003, AQY faced a precipitous membership decline.¶ Resiliency¶ In February 2006, twenty-three convicted terrorists escaped from a high-security prison in the capital of Sana'a, a turning point for al-Qaeda in the region. Many of the escapees worked to "resurrect al-Qaeda from the ashes" (PDF) and launch a fresh campaign of attacks. Among them was Nasser al-Wuhayshi, who today leads AQAP.¶ In late 2008, a crackdown by the Saudi government led remnants of the local al-Qaeda franchise there to flee across the border and unite with the resurgent jihad in Yemen. The two branches merged in 2009.¶ The U.S. State Department estimates the organization has "close to a thousand members." This represents dramatic growth from some two-to-three-hundred members in 2009, Yemen expert Gregory Johnsen notes, even as so-called al-Qaeda central, based in Pakistan, has declined.¶ AQAP has claimed responsibility for numerous attacks in the region since 2006. These have included the failed August 2009 assassination attempt on Saudi prince Mohammed bin Nayef; an attack on the U.S. in Sana'a in 2008; attacks on Italian and British embassies; suicide bombings targeting Belgian tourists in January 2008 and Korean tourists in March 2009; bombings of oil pipelines and production facilities; and the bombing of a Japanese oil tanker in April 2008. In May 2012, a suicide bomber killed more than ninety Yemeni soldiers rehearsing for a military parade in the capital of Sana'a, the largest attack since Hadi assumed power in early 2012.¶ AQAP has also been implicated in plots on the U.S. homeland, including Umar Farouk Abdulmutallab's failed 2009 Christmas Day bombing, Faisal Shahzad's attempted 2010 Times Square bombing, and the foiled May 2012 Detroit airliner bomb plot.¶ More than half of the 166 prisoners held in the U.S. military prison at Guantanamo Bay are Yemenis, and President Barack Obama's long-standing pledge to shut down the facility is contingent on repatriating them. But some U.S. lawmakers have objected, raising concern about the prisoners' return to the battlefield through detention and reintegration programs.¶ An Effective Propaganda¶ The primary goals of AQAP are consistent with the principles of militant jihad, which aims to purge Muslim countries of Western influence and replace secular "apostate" governments with fundamentalist Islamic regimes observant of sharia law. Associated AQAP objectives include overthrowing the regime in Sana'a; assassinating Western nationals and their allies, including members of the Saudi royal family; striking at related interests in the region, such as embassies and energy concerns; and attacking the U.S. homeland.¶ The group has also mastered recruitment through propaganda and media campaigns. A bimonthly AQAP magazine in Arabic, Sada al-Malahim ("The Echo of Battles"), is tailored to a Yemeni audience and offers theological support and praise for jihadists. The U.S.-born Anwar al-Awlaki and Pakistani-American Samir Khan were central figures in AQAP's production of propaganda aimed at Western audiences. Though they were killed in an October 2011 U.S. drone strike, their English-language propaganda magazine Inspire continues to be published. U.S. Major Nidal Hasan exchanged emails with Awlaki prior to his shooting rampage at the U.S. Army's Fort Hood in 2009.¶ Analysts say that AQAP's messaging attracts recruits by "minimiz[ing] global jihad while emphasizing national struggle," focusing on jihad as an answer to local grievances while remaining focused on what jihadists call the "far enemy"—the United States, particularly for its unholy alliance with Saudi Arabia.

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#### Links to disad

Omar S. Bashir 12, Ph.D. candidate in the Department of Politics at Princeton University and a graduate of the Department of Aeronautics and Astronautics at MIT, 9/24/12, "Who Watches the Drones?" Foreign Affairs,www.foreignaffairs.com/articles/138141/omar-s-bashir/who-watches-the-drones

First, imagine that the government opted for full transparency in its drone programs. That would certainly make the government more accountable, with no special oversight system needed. Officials would release all the necessary information for citizens to assess the ethics of the programs themselves. This would include answers to such questions as: What crimes have targeted individuals allegedly committed? What threats do they pose? Who else might be harmed in a drone attack? How feasible are non-lethal options such as capture? In practice, though, full transparency is neither morally nor strategically ideal. For one, the government has a duty to protect its civilian informants, so there is risk in revealing the government's sources of information. And potential targets could adjust their behaviors were capture proposals to be debated openly. That would make it all the more difficult for the government to use non-lethal options to round up suspects. ¶ So how much transparency is enough? How can citizens know that the state is not overselling the sensitivity of details that it chooses to withhold? This central dilemma has not been resolved. Well-intentioned legal efforts undertaken by the ACLU and others to force openness about the drone program have only led the government to dig in its heels. It refuses to formally declassify even widely known facets of its operations, let alone release new details. The refusal is absurd on the surface, but it fits into an understandable strategy. Washington does not believe that limited declassifications would appease drone skeptics. As Jack Goldsmith, the Harvard law professor, has explained, Washington fears a slippery slope toward full transparency in the courts that might render one of its most potent counterterrorism weapons unusable.

#### More ev---Congress won’t enforce the CP

Deborah Pearlstein 13, Professor of Public and International Affairs at Princeton, 3/26/13, http://www.slate.com/articles/news\_and\_politics/jurisprudence/2013/03/congress\_shouldn\_t\_give\_president\_obama\_new\_power \_to\_fight\_terrorists.html)

If Congress legislates, it can establish limits on the scope of the president’s authority by setting the rules for him to exercise it. The search for meaningful constraints on power is indeed the central challenge of our constitutional system. But Congress has an abysmal track record of successfully reining in presidential uses of force overseas. And there is little cause for hope it will succeed here. Consider the recent history. Congress decided in the days after 9/11 to authorize the use of force against a limited set of targets responsible for the attacks of 9/11, and two presidents have now used that authority to its fullest. But such broad congressional authority has not stopped President Obama, just like his predecessors, from asserting that he retains inherent authority to use force in self-defense under Article II of the Constitution, above and beyond what Congress authorizes. Congress can authorize whatever new wars it wishes; the president can still use force against imminent threats without it.

#### Not credible---external oversight key

Jack Goldsmith 13, Henry L. Shattuck Professor at Harvard Law School, May 1 2013, “How Obama Undermined the War on Terror,” <http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism>

For official secrecy abroad to work, the secrets must be kept at home as well. In speeches, interviews, and leaks, Obama's team has tried to explain why its operations abroad are lawful and prudent. But to comply with rules of classified information and covert action, the explanations are conveyed in limited, abstract, and often awkward terms. They usually raise more questions than they answer—and secrecy rules often preclude the administration from responding to follow-up questions, criticisms, and charges. ¶ As a result, much of what the administration says about its secret war—about civilian casualties, or the validity of its legal analysis, or the quality of its internal deliberations—seems incomplete, self-serving, and ultimately non-credible. These trust-destroying tendencies are exacerbated by its persistent resistance to transparency demands from Congress, from the press, and from organizations such as the aclu that have sought to know more about the way of the knife through Freedom of Information Act requests.¶ A related sin is the Obama administration's surprising failure to secure formal congressional support. Nearly every element of Obama's secret war rests on laws—especially the congressional authorization of force (2001) and the covert action statute (1991)—designed for different tasks. The administration could have worked with Congress to update these laws, thereby forcing members of Congress to accept responsibility and take a stand, and putting the secret war on a firmer political and legal foundation. But doing so would have required extended political efforts, public argument, and the possibility that Congress might not give the president precisely what he wants.¶ The administration that embraced the way of the knife in order to lower the political costs of counterterrorism abroad found it easier to avoid political costs at home as well. But this choice deprived it of the many benefits of public argumentation and congressional support. What Donald Rumsfeld said self-critically of Bush-era unilateralism applies to Obama's unilateralism as well: it fails to "take fully into account the broader picture—the complete set of strategic considerations of a president fighting a protracted, unprecedented and unfamiliar war for which he would need sustained domestic and international support." ¶ Instead of seeking contemporary congressional support, the administration has relied mostly on government lawyers' secret interpretive extensions of the old laws to authorize new operations against new enemies in more and more countries. The administration has great self-confidence in the quality of its stealth legal judgments. But as the Bush administration learned, secret legal interpretations are invariably more persuasive within the dark circle of executive branch secrecy than when exposed to public sunlight. On issues ranging from proper targeting standards, to the legality of killing American citizens, to what counts as an "imminent" attack warranting self-defensive measures, these secret legal interpretations—so reminiscent of the Bushian sin of unilateral legalism—have been less convincing in public, further contributing to presidential mistrust.¶ Feeling the heat from these developments, President Obama promised in his recent State of the Union address "to engage with Congress to ensure not only that our targeting, detention, and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are even more transparent to the American people and to the world." So far, this promise, like similar previous ones, remains unfulfilled. ¶ The administration has floated the idea of "[shifting] the CIA's lethal targeting program to the Defense Department," as The Daily Beast reported last month. Among other potential virtues, this move might allow greater public transparency about the way of the knife to the extent that it would eliminate the covert action bar to public discussion. But JSOC's non-covert targeted killing program is no less secretive than the CIA's, and its congressional oversight is, if anything, less robust. ¶ A bigger problem with this proposed fix is that it contemplates executive branch reorganization followed, in a best-case scenario, by more executive branch speeches and testimony about what it is doing in its stealth war. The proposal fails to grapple altogether with the growing mistrust of the administration's oblique representations about secret war. The president cannot establish trust in the way of the knife through internal moves and more words. Rather, he must take advantage of the separation of powers. Military detention, military commissions, and warrantless surveillance became more legitimate and less controversial during the Bush era because adversarial branches of government assessed the president's policies before altering and then approving them. President Obama should ask Congress to do the same with the way of the knife, even if it means that secret war abroad is harder to conduct.

### WOT DA

#### No McKelvey---Their card is about the second half of a two-part legal justification for targeted killings---the government only has to prevail on one justification

Benjamin McKelvey 11, J.D., Vanderbilt University Law School, November 2011, “NOTE: Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power,” Vanderbilt Journal of Transnational Law, 44 Vand. J. Transnat'l L. 1353

In its brief in response, the DOJ argued that the President's power to conduct the targeted killing of Aulaqi comes from two sources of authority. n77 First, and more narrowly, the DOJ argued that the Authorization for the Use of Military Force (AUMF) serves as a statutory grant of authority to retaliate against threats of terrorism from al-Qaeda. n78 Second, and much more broadly, the DOJ argued that the authority to use defensive force against imminent threats of terrorism is inherent in the President's Article II military power. n79 Both arguments turn on the theory that targeted killing decisions are nonjusticiable political questions beyond judicial review. n80 As the following analysis demonstrates, this is a dubious assertion based on overbroad and inaccurate interpretations of the AUMF and the President's constitutional war powers.

A. The Scope of the AUMF Is Not a Political Question

In Aulaqi, the DOJ asserted that the President has the authority to conduct targeted killing pursuant to congressionally granted war power, n81 but this argument relies on an overbroad interpretation of the AUMF. It is debatable whether the scope of the AUMF and the powers it grants the Executive Branch encompass the circumstances of the Aulaqi case. Furthermore, the scope of a congressional authorization for the use of military force is certainly an appropriate subject for judicial review, particularly where powers under the authorization may infringe on due process rights. n82 As a matter of law, courts may properly review this issue.

Congress passed the AUMF in response to the terrorist attacks of September 11, but the actual text of the Authorization casts doubt [\*1364] on whether this authority extends to all suspected terrorists or only those responsible for the September 11 attacks. n83 The AUMF authorizes the President to use "all necessary and proper force" against those "he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." n84 The purpose of this authorization is to "prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." n85 Although the goal of the Authorization is the prevention of more terrorist attacks, the designated authority appears to rest on a September 11 predicate. n86 In other words, those involved in the September 11 terrorist attacks are legal targets, but do all suspected terrorists fall within this construction?

In its brief in response, the DOJ never alleged that Aulaqi was connected to the September 11 attacks. n87 However, the DOJ did assert that Aulaqi had emerged as a senior leader in al-Qaeda in the Arabian Peninsula. n88 So, while it appears that Aulaqi did not personally satisfy the September 11 predicate of the AUMF, it can be argued that membership or affiliation with al-Qaeda is enough to satisfy the AUMF. n89 Al-Qaeda planned and executed the terrorist attacks of September 11, and the AUMF authorizes lethal force against al-Qaeda. n90 Yet, the scope of the AUMF is unclear, as is the conclusion that Aulaqi fit within this scope. n91

More importantly, the argument that the AUMF grants the President authority to conduct targeted killings of Americans is itself likely subject to judicial review. Contrary to the DOJ's assertion, there is ample precedent to suggest that the scope of congressionally authorized war power is a matter subject to judicial review and not an exclusively political question. n92 Whether Anwar al-Aulaqi satisfies [\*1365] the September 11 predicate in specific circumstances may be a political question, but the targeted killing of Americans without due process is a matter of law subject to judicial review. n93 The court in Aulaqi should have focused on this broader question of law and probably erred in declining to do so. n94

If a court were to decide whether the AUMF permits the targeted killing of Americans, it would likely exercise restraint so that the AUMF does not operate to permit total global military power. n95 An unrestrained interpretation would allow the Executive to use lethal force against any person, anywhere in the world, simply by accusing that person of a relationship to terrorist organizations that were involved in the September 11 attacks. n96 A more balanced interpretation would not go as far while still enabling the Executive to effectively confront the threat of global terrorism. n97 A demonstration of specific evidence that Aulaqi was a senior leader with al-Qaeda would have gone a long way toward establishing the AUMF as the proper source of authority in this situation. n98 However, the DOJ argued that no such demonstration of evidence or independent review was even required. n99 This position supports an unrestrained interpretation of the AUMF in which the Executive can use lethal force against any person in any location simply on the basis of an unsubstantiated accusation. This is arguably an improper interpretation of the congressional purpose and intent behind the passage of the AUMF. n100

[\*1366]

B. The Constitutionality of Targeted Killing Is Not a Political Question

In the alternative, and far more broadly, the DOJ argued that executive authority to conduct targeted killings is constitutionally committed power. n101 Under this interpretation, the President has the authority to defend the nation against imminent threats of attack. n102 This argument is not limited by statutory parameters or congressional authorization, such as that under the AUMF. n103 Rather, the duty to defend the nation is inherent in the President's constitutional powers and is not subject to judicial interference or review. n104

The DOJ is correct in arguing that the President is constitutionally empowered to use military force to protect the nation from imminent attack. n105 As the DOJ noted in its brief in response, the Supreme Court has held that the president has the authority to protect the nation from "imminent attack" and to decide the level of necessary force. n106 The same is true in the international context. Even though Yemen is not a warzone and al-Qaeda is not a state actor, international law accepts the position that countries may respond to specific, imminent threats of harm with lethal force. n107 [\*1367] Under these doctrines of domestic and international law, the use of lethal force against Aulaqi was valid if he presented a concrete, specific, and imminent threat of harm to the United States. n108

Therefore, the President was justified in using lethal force to protect the nation against Aulaqi, or any other American, if that individual presented a concrete threat that satisfied the "imminence" standard. n109 However, the judiciary may, as a matter of law, review the use of military force to ensure that it conforms with the limitations and conditions of statutory and constitional grants of authority. n110 In the context of targeted killing, a federal court could evaluate the targeted killing program to determine whether it satisfies the constitutional standard for the use of defensive force by the Executive Branch. Targeted killing, by its very name, suggests an entirely premeditated and offensive form of military force. n111 Moreover, the overview of the CIA's targeted killing program revealed a rigorous process involving an enormous amount of advance research, planning, and approval. n112 While the President has exclusive authority over determining whether a specific situation or individual presents an imminent threat to the nation, the judiciary has the authority to define "imminence" as a legal standard. n113 These [\*1368] are general concepts of law, not political questions, and they are subject to judicial review. n114

Under judicial review, a court would likely determine that targeted killing does not satisfy the imminence standard for the president's authority to use force in defense of the nation. Targeted killing is a premeditated assassination and the culmination of months of intelligence gathering, planning, and coordination. n115 "Imminence" would have no meaning as a standard if it were stretched to encompass such an elaborate and exhaustive process. n116 Similarly, the concept of "defensive" force is eviscerated and useless if it includes entirely premeditated and offensive forms of military action against a perceived threat. n117 Under judicial review, a court could easily and properly determine that targeted killing does not satisfy the imminence standard for the constitutional use of defensive force. n118

\*\*\*THEIR CARD ENDS\*\*\*

IV. Challenging the Constitutionality of Targeted Killing: A Clear Violation of Due Process

The President's supposed authority to conduct targeted killings of Americans is highly questionable. n119 Moreover, the DOJ's argument that targeted killing is a political question within executive discretion inaccurately portrays the judiciary's power to review broader questions of law. n120 Yet in addition to these compelling objections to the legal underpinnings of targeted killing authority, targeted killing likely violates existing law as well. n121 Targeted killing is a unilateral government execution that completely [\*1369] circumvents traditional notions of law enforcement and violates even minimum notions of established due process. n122

A. How Due Process Rights Are Determined

Despite the fact that Aulaqi was hiding in Yemen, the Fifth Amendment still protected him. The Supreme Court has held that Americans enjoy the same constitutional protections abroad as in American territory, unless the application of the Bill of Rights would prove "impracticable and anomalous." n123 The rationale for this principle is that although Americans are not completely without constitutional protections abroad, it may not always be feasible to ensure all of these protections. n124 The application of the Bill of Rights abroad must take into account "the particular circumstances, the practical necessities, and the possible alternatives" of the situation at hand. n125 Analyzing Aulaqi's Fifth Amendment rights is especially complex given the many political, economic, and security problems in Yemen at the time of his killing. n126

The Fifth Amendment provides, in part, that no American may be "deprived of life, liberty, or property, without due process of law." n127 The case of Anwar al-Aulaqi implicates procedural due process because the plaintiff's complaint alleges that the government is attempting to deprive Aulaqi of life without any formal presentation of the charges against him or an opportunity to protest these charges at a hearing before an impartial judge. n128 The Supreme [\*1370] Court uses a balancing test for determining the level of due process in different contexts. n129 This balancing test has three factors: the private interest that will be affected by a deprivation, the risk of an erroneous deprivation by the procedural method in question, and the government interests involved. n130

Aulaqi's case represents a collision of the first and third factors. n131 The deprivation in question was Aulaqi's life, the most serious deprivation in law. n132 In the case of judicial error or procedural shortfall, property can be returned and liberty can be restored, but the deprivation of life is permanent. However, the government's interest in protecting American citizens from the unrelenting threat of terrorism is also compelling. n133 The exigencies involved in combating terrorism require decisive action and safeguards for intelligence sources that help identify threats. n134 Under such extraordinary circumstances, the time and resources involved in satisfying procedural due process rights might also serve to inadvertently amplify specific threats of terrorism. n135

The purpose of the Fifth Amendment, however, is to provide protections for citizens, not to increase the power of government or to ease the burden of government agencies under exigent circumstances. n136 Given this constitutional purpose and the unique importance of life as a civil liberty, it is clear that Aulaqi is owed at least the minimum form of due process protection.

#### The aff is key middle ground---total flex causes worse decision-making in crises

Deborah N. Pearlstein 9, lecturer in public and international affairs, Woodrow Wilson School of Public & International Affairs, July 2009, "Form and Function in the National Security Constitution," Connecticut Law Review, 41 Conn. L. Rev. 1549, lexis nexis

It is in part for such reasons that studies of organizational performance in crisis management have regularly found that "planning and effective [\*1604] response are causally connected." n196 Clear, well-understood rules, formalized training and planning can function to match cultural and individual instincts that emerge in a crisis with commitments that flow from standard operating procedures and professional norms. n197 Indeed, "the less an organization has to change its pre-disaster functions and roles to perform in a disaster, the more effective is its disaster [sic] response." n198 In this sense, a decisionmaker with absolute flexibility in an emergency-unconstrained **by protocols or plans-may be** systematically more prone to error **than a decision-maker who is in some way compelled to follow procedures and guidelines, which have incorporated professional expertise, and which are set as effective constraints in advance**.¶ **Examples of excessive flexibility producing adverse consequences are ample**. Following Hurricane Katrina, one of the most important lessons independent analysis drew from the government response was the extent to which the disaster was made worse as a result of the lack of experience and knowledge of crisis procedures among key officials, the absence of expert advisors **replacing those rules with more than the most general guidance about custodial intelligence collection.** available to key officials (including the President), and the failure to follow existing response plans or to draw from lessons learned from simulations conducted before the fact. n199 Among the many consequences, [\*1605] basic items like food, water, and medicines were in such short supply that local law enforcement (instead of focusing on security issues) were occupied, in part, with breaking into businesses and taking what residents needed. n200¶ Or **consider the widespread abuse of prisoners at U.S. detention facilities such as** Abu Ghraib. Whatever the theoretical merits of applying coercive interrogation in a carefully selected way against key intelligence targets, n201 the systemic torture and abuse of scores of detainees was an outcome no one purported to seek. There is substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security. n202 While there remain important questions about the extent to which some of the abuses at Abu Ghraib were the result of civilian or senior military command actions or omissions, one of the too often overlooked findings of the government investigations of the incidents is the unanimous agreement that the abuse was (at least in part) the result of structural organization failures n203 -failures that one might expect to [\*1606] produce errors either to the benefit or detriment of security.¶ In particular, military investigators looking at the causes of Abu Ghraib cited vague guidance, as well as inadequate training and planning for detention and interrogation operations, as key factors leading to the abuse. Remarkably, "pre-war planning [did] not include[] planning for detainee operations" in Iraq. n204 Moreover, **investigators cited failures at the policy level- decisions to lift existing detention and interrogation strictures without** n205 As one Army General later investigating the abuses noted: "**By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved**." n206 It was thus unsurprising that detention and interrogation operations were assigned to troops with grossly inadequate training in any rules that were still recognized. n207 The uncertain effect of broad, general guidance, coupled [\*1607] with the competing imperatives of guidelines that differed among theaters of operation, agencies, and military units, caused serious confusion among troops and led to decisionmaking that it is overly kind to call arbitrary. n208¶ Would the new functionalists disagree with the importance of government planning for detention operations in an emergency surrounding a terrorist nuclear attack? Not necessarily. Can an organization anticipate and plan for everything? Certainly not. But **such findings should at least** call into question the inclination to simply maximize flexibility **and discretion in an emergency, without, for example, structural incentives that might ensure the engagement of professional expertise**. n209 Particularly if one embraces the view that the most potentially damaging terrorist threats are nuclear and biological terrorism, involving highly technical information about weapons acquisition and deployment, a security policy structure based on nothing more than general popular mandate and political instincts is unlikely to suffice; a structure that systematically excludes knowledge of and training in emergency response will almost certainly result in mismanagement. n210 In this light, a general take on role effectiveness might suggest favoring a structure in which the engagement of relevant expertise in crisis management is required, leaders have incentives to anticipate and plan in advance for trade-offs, and [\*1608] organizations are able to train subordinates to ensure that plans are adhered to in emergencies. Such structural constraints could help increase the likelihood that something more than arbitrary attention has been paid **before transcendent priorities are overridden.**